TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 12

AMERICAN SURETY COMPANY OF NEW YORK,
PETITIONER,

vs.

WESTINGHOUSE ELECTRIC MANUFACTURING
COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI FILED MARCH 27, 1935.

CERTIORARI GRANTED APRIL 29, 1935.

SUPREME COURT OF THE UNITED STATES

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TRANSCRIPT OF RECORD.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

No. .....

IN THE MATTER OF:

MELTON J. GRAY, trading as GRAY ARTESIAN WELL COMPANY, Bankrupt.

OBJECTIONS of Westinghouse Electric Manufacturing Company, a corporation; National Cast Iron Pipe Company, a corporation; Walter A. Taylor; Frederick Gillmore and Company, a corporation; and A. G. Runyan, Randall Bell and Sheppard Cobb, trading as Runyan-Cobb Boiler Works, to the claim of American Surety Company of New York, a corporation.

Appeal from the District Court of the United States in and for the Northern District of Florida.

In the District Court of the United States for the Northern District of Florida.

In the Matter of:
Melton J. Gray, trading as Gray Artesian Well Company, Bankrupt.

On the 11th day of April, A. D. 1934, the following Directions to Clerk for Making Up Transcript of Record was filed in the above cause:

In the District Court of the United States for the Northern District of Florida.

In the Matter of:
Melton J Gray, trading as Gray Artesian Well Company, Bankrupt.

Objections of Westinghouse Electric Manufacturing Company, a corporation; National Cast Iron Pipe Company, a corporation; Walter A. Taylor; Frederick Gillmore & Company, a corporation; and A. G. Runyan, Randall Bell and Sheppard Cobb, trading as Runyan-Cobb Boiler Works, to the claim of American Surety Company of New York, a corporation.

In making the transcript upon the appeal to the Circuit Court of Appeals herein the Clerk will incorporate therein the following portions of the record:

2 (1) Certificate of the Referee to the District Judge dated December 14, 1933, with all exhibits and also the papers referred to therein and filed therewith which are mentioned below in paragraphs 2 to 8 of this praecipe.

(2) Original proof of claim of American Surety Company.

(3) Objections of Runyan-Cobb Boiler Works to claim of American Surety Company.

(4) Supplemental proof of claim of American Surety Company.

(5) Additional objections of Runyan-Cobb Boiler Works to Supplemental proof of claim of American Surety Company.

(6) Objections of Westinghouse Electric Manufacturing Company and others to supplemental proof of claim of American Surety Company.

(7) Order of Referee dated November 21, 1933, sustaining the objections to the claim of priority of American Surety Company.

(8) Petition of American Surety Company for review by the District Judge of the Referee's order dated November 21, 1933.

(9) Order of the District Judge dated March 8, 1934, sustaining the Referee's order of November 21, 1933.

(10) Petition of American Surety Company for allowance of appeal to the Circuit Court of Appeals.

(11) Assignment of errors on Appeal of American Surety Company.

(12) Order of the District Judge dated April 7, 1934, allowing appeal.

(13) Bond of American Surety Company on appeal.

(14) Citation on appeal.

All other papers will be omitted.

This April 10th, 1934.

CARTER & YONGE,
Attorneys for American
Surety Company.

3 We acknowledge receipt of and copy of the foregoing praecipe indicating the portions of the record to be incorporated in the transcript on appeal on this 11th day of April, 1934. We do not

desire any additional portions of the record incorporated in the transcript and consent that the Clerk proceed at once to make up the record.

WATSON & PASCO &
BROWN,
Attorneys for Westinghouse Electric Manufacturing Company, National Cast Iron Company, Walter A. Taylor and Frederick Gillmore & Company,

FISHER & FISHER,
WM. FISHER,
Attorneys for A. G. Runyan, Randall Bell, and Sheppard Cobb, trading as Runyan-Cobb Boiler Works, T. D. Brux Company, a corporation and Runyan Machine and Boiler Works.

J. McHENRY JONES,
Attorney for W. H. Owens, Trustee in Bankruptcy of the estate of Melton J. Gray, trading as Gray Artesian Well Company.

HOLSBERRY & HOLSBERRY,
Attorneys for H. L. Gray, W. C. Gray, Ray Hardware and Truck Company and Electric Controller and Manufacturing Company.

KNOWLES BROTHERS AGENCY,
By KNOWLES HYER,
V. P. & .....

(1) CERTIFICATE OF REFEREE TO THE DISTRICT JUDGE, as stated in the above directions:

(Title Omitted.)

4 I, Alston Fisher, one of the referees in bankruptcy, of said Court, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings:

That the American Surety Company prior to the adjudication of the bankrupt herein, was surety on a bond given by the bankrupt to the United States in connection with a contract for public work performed by the said bankrupt for the United States at the Naval Air Station, Pensacola, Florida, copies of said contract and said bond being attached hereto and made a part hereof by reference. That said bond was conditioned according to law, which included a condition that the contractor would promptly make payment to all persons furnishing labor and materials for the prosecution of this work under the said contract. The penalty of the bond was $3940.00. The work on the contract was completed but there remained outstanding due and unpaid, to people who had furnished labor and materials for the prosecution of the work the sum of $5677.85, which said sum came within the protection of the penalty and condition of the said bond. That thereafter suit was brought in the District Court of the United States for the Northern District of Florida on said bond and said Surety Company appeared in said suit and paid into Court the penal sum of the said bond which was distributed ratably to the said labor and material men but that said sum was insufficient to pay said claims in full.

That the sum of $2724.23 remained unpaid by the United States to the said bankrupt as balance due

under said contract, which said sum, subsequent to the adjudication of said bankrupt was paid into the hands of W. H. Owens, as trustee of this estate in bankrupt. That subsequent thereto petitions were filed with the undersigned by the various labor and material men, who had furnished labor and materials in the prosecution of the work under said contract, in which petitions the said creditors claimed that they were entitled to a lien upon said fund and to priority of payment therefrom of the balance due them after deducting their pro rata share of the sum paid into Court by the American Surety Company as aforesaid. That the undersigned by order dated September 2, 1933, allowed said petitions to be filed in this proceeding upon the theory that the aforesaid fund, which was paid by the United States to the trustee in bankruptcy came into his hands charged with the rights of the labor and material men, whose labor and materials created said fund. It was the opinion of the undersigned that said creditors were secured by an equitable lien upon the fund. See in re: P. McGarry and Son, 240 Federal 400.

On January 20, 1932, the said American Surety Company filed its proof of claim and on September 15, 1933, its supplemental proof of claim; in which it claimed to be entitled to a lien upon the said fund in the hands of the trustee to secure its repayment of the amount of the penalty of its said bond, heretofore paid into Court and distributed ratably as aforesaid; which said lien was claimed by said company to be prior in dignity to the claims of the labor and material men. That said petition of the American Surety Company for priority was objected to by various labor and material men creditors. After a hearing had thereon before the undersigned, on the 21st day of November, 1933, an order was entered sustaining the said objections to the petition of the American Surety

Company for priority, in which order the claim of the American Surety Company was allowed but held to be inferior to the claims of the aforesaid creditors. Thereafter the said American Surety Company on December 14th, 1933, filed with the undersigned a petition for review by the District Judge, of the aforesaid order denying their said priority of payment.

That in the opinion of the undersigned the order which is hereby subjected to review is correct upon authority of State of Mississippi vs. First National Bank of Greenville, (C. C. A. 5) 66 Fed. 2nd, 9.

There is submitted herewith in addition to the said contract and bond above referred to all papers filed with the undersigned pertinent to this proceeding, consisting of the following:

Original claim of American Surety Company.

Objections to claim by Runyan-Cobb Boiler Works.

Supplemental claim of American Surety Company.

Additional objections of Runyan-Cobb to Supplemental claim of American Surety Company.

Objections of Westinghouse Electric Mfg. Co., National Cast Iron Pipe Company, Walter A. Taylor, and Frederick Gillmore & Company to supplemental claim of American Surety Company.

Order of Referee sustaining objections to claim of American Surety Company.

Petition for review by American Surety Company.

And the said question is certified to the Judge for his opinion thereon.

Dated at Pensacola, in said District, this 14th day of December, A. D. 1933.

ALSTON FISHER,
Referee in Bankruptcy.

(And attached thereto the following contract and bond):

7 Copy.

Standard Form No. 23. NOy-934
Approved by the President (Spec. 6288.)
Nov. 19, 1926.

Standard Government Form of Contract.
(Construction.)

Navy Department.
(Bureau of Yards and Docks.)
(Department.)

Gray Artesian Well Company.
(Contractor.)

Contract for Well, Amount $13,133.36.
Place, Naval Air Station, Pensacola, Florida.

7½ Contract for Construction.

This Contract, entered into this 8th day of November, 1930, by the United States of America, hereinafter called the Government, represented by the contracting officer executing this contract, and Melton J. Gray, an individual trading as Gray Artesian Well Company of the City of Pensacola, in the State of Florida, hereinafter called the contractor, witnesseth, that the parties hereto do mutually agree as follows:

Article 1. Statement of Work.—The contractor shall furnish all labor and materials, and perform all work

required for sinking a well, constructing a pump enclosure, and installing deep well pumping equipment therein, at the Naval Air Station, Pensacola, Florida, as contemplated by Item 1, paragraph 6-02, of Specification No. 6288, based on furnishing a Pomona pump.

for the consideration of Thirteen thousand one hundred thirty-three dollars and thirty-six cents ($13,133.36),

in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Said Specification No. 6288, the General Provisions, drawings and standard specifications mentioned therein, the Instructions Relative to Factory Inspection mentioned in said General Provisions; bulletin No. 15, curve sheet and description of the Pomona Turbine Pumping Unit, specification of the motor, dimension sheet of the pump head, and sectional view of the deep well pump.

The work shall be commenced within 7 calendar days after date of receipt of notice to proceed and shall be completed within 120 calendar days from the date of receipt of notice to proceed.

8 Article 2. Specifications and Drawings.—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the contracting officer, without whose

decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided. Upon completion of the contract the work shall be delivered complete and undamaged.

Article 3. Changes.—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Article 4. Changed conditions.—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materialy differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds

that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.

Article 5. Extras.—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

Article 6. Inspection.—(a) All material and workman ship (if not otherwise designated by the specifications) shall be subject to inspection, examination, and test by Government inspectors at any and all times during the manufacture and (or) construction and at any and all places where such manufacture and (or) construction are carried on. The government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the contractor shall promptly segregate and remove the same from the premises.

9 (b) The contractor shall furnish promptly without additional charge, all reasonable facilities, labor, and materials necessary for the safe and convenient inspection and test that may be required by the inspection. All inspection and tests by the Government shall be performed in such manner as not to unnecessarily delay the work. Special, full size, and performance tests shall be as described in

the specifications. The contractor shall be charged with any additional cost of inspection when material and workmanship is not ready at the time inspection is requested by the contractor.

(c) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the contractor shall on request promptly furnish all necessary facilities, labor, and material. If such work is found to be defective in any material respect, due to fault of the contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, the actual cost of labor and material necessarily involved in the examination and replacement, plus 15 per cent, shall be allowed the contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

(d) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departures from specific requirements of the contract and the specifications and drawings made a part thereof, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the requirements contained in the preceding sentence, the inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site.

Article 7.—Materials and workmanship.—Unless otherwise specifically provided for in the specifications, all workmanship, equipment, materials, and articles incorporated in the work covered by this contract are to be of the best grade of their respective kinds for the purpose. Where equipment, materials, or articles are referred to in the specifications as "equal to" any particular standard, the contracting officer shall decide the question of equality. The contractor shall furnish to the contracting officer for his approval the name of the manufacturer of machinery, mechanical and other equipment which he contemplates installing, together with their performance capacities and other pertinent information. When required by the specifications, or when called for by the contracting officer, the contractor shall furnish the contracting officer for approval full information concerning the materials or articles which he contemplates incorporating in the work. Samples of materials shall be submitted for approval when so directed. Machinery, equipment, materials, and articles installed or used without such approval shall be at the risk of subsequent rejection. The contracting officer may require the contractor to dismiss from the work such employee as the contracting officer deems incompetent, careless, insubordinate, or otherwise objectionable.

Article 8. Superintendence by contractor. —The contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the contracting officer, on the work at all times during progress, with authority to act for him.

Article 9. Delays—Damages.—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work

within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: Provided, that the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: Provided Further, that the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty

days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

Article 10. Permits and care of work.—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

Article 11. Eight-hour law—Convict labor.—(a) No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work at the site thereof. For each violation of the requirements of this article a penalty of five dollars shall be imposed upon the contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work, and all penalties thus imposed shall be withheld for the use and benefit of the Government: Provided, That this stipulation shall be subject in all respects to the exceptions and provisions of the act of June 19, 1912 (37 Stat. 137), relating to hours of labor.

(b) The contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

Article 12. Covenant against contingent fees.—The contractor warrants that he has not employed any

person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to terminate the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

Article 13.—Other contracts.—The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

Article 14. Officials not to benefit.—No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

Article 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

Article 16. Payments to contractors.—(a) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration.

(b) In making such partial payments there shall be retained 10 per cent on the estimated amount until final completion and acceptance of all work covered by the contract: Provided, however, That the contracting officer, at any time after 50 per cent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full: And provided further, That on completion and acceptance of each separate building, vessel, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made in full, including retained percentages thereon, less authorized deductions.

(c) All material and work covered by partial payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the contractor from the sole responsibility for the care and protection of materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fulfillment of all of the terms of the contract.

(d) Upon completion and acceptance of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher

therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

Article 17. Additional security.—Should any surety upon the bond for the performance of this contract become unacceptable to the Government, the contractor must promptly furnish such additional security as may be required from time to time to protect the interest of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by the contract.

Article 18. Definitions.—(a) The term "head of department" as used herein shall mean the head of the executive department or independent establishment involved, and "his representative" means any person authorized to act for him other than the contracting officer.

(b) The term "contracting officer" as used herein shall include his duly appointed successor or his duly authorized representative.

Article 19. Alterations.—The following changes were made in this contract before it was signed by the parties hereto:

In Article 18 (a), the words "other than the contracting officer" have been deleted.

Article 20. Patents.—The contractor shall hold and save the Government, its officers, agents, servants, and employees, harmless from liability of any nature or kind for or on account of the use of any patented or unpatented invention, article, or appliance furnished

or used in the performance of this contract, excepting patented articles required by the Government in its specifications, the use of which the contractor does not control.

In Witness Whereof, the parties hereto have executed this contract as of the day and year first above written.

THE UNITED STATES OF AMERICA
By A. L. PARSONS,
Chief of the Bureau of Yards and Docks Acting under the direction of the Secretary of the Navy. (Official Title)
By GRAY ARTESIAN WELL CO.,
By M. J. GRAY,
Contractor.
Pensacola, Florida, (Business address.)

Two witnesses:
W. J. KELLY,
JOS. S. RIERA.

(O. K. as to Form and Execution D. F. S.)

13 Copy.

Standard Form No. 25 Approved by the President Nov. 19, 1926.

6288

Standard Government Form of Performance Bond
(Construction or Supply)

Know All Men By These Presents, That we, Melton I. Gray, an individual trading as Gray Artesian Well Company, (See Instructions 4, 5 and 7) as Principal,

and American Surety Company of New York as Surety, (See Instructions 2, 3, 4, and 7) are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of Three Thousand Nine Hundred Forty ($3,940.00) Dollars lawful money of the United States, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition Of This Obligation Is Such, that whereas the principal entered into a certain contract, hereto attached, with the Government, dated November 8th, 1930, for sinking a well, constructing a pump enclosure, and installing deep well pumping equipment therein, at the Naval Air Station, Pensacola, Fla., in accordance with Specification No. 6288.

Now Therefore, If the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Government, with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, and if said contract is for the construction or repair of a public building or a public work within the meaning of the act of August 13, 1894, as amended by act of February 25, 1905, shall promptly make payment to all persons supplying the principal with labor and materials in the prosecution of the work provided for in said contract, and any such authorized extension or modification thereof, then, this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several seals this 15th day of November, 1930, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by the undersigned representative, pursuant to authority of its governing body.

GRAY ARTESIAN WELL COMPANY,
By M. J. GRAY,
(Seal) (Individual principal) Sole Owner.
Pensacola, Fla. (Business address).

AMERICAN SURETY COMPANY OF NEW YORK,
(Corporate Surety).
By J. V. RIERA,
Atty-in-Fact New York, N. Y. (Business Address.)

In presence of:
W. J. KELLY,
Pensacola, Fla. (Address).
JOS. S. RIERA,
Pensacola, Fla. (Address.)

Treasury Department Office of the Secretary Section of Surety Bonds Division of Appointments Dec. 9, 1930.

Examined and approved as to the within corporate surety.

Attest:
J. E. HARPER,
Chief, Division of Appointments.
Attest:
.....

Navy Department Approved:
D. F. SELLERS,
Judge Advocate General.

The rate of premium on this bond is $15.00 per thousand.

Total amount of premium charged, $196.99.

(The amount must be filled in by corporate surety).

15 Copy.

Received G. A. O. May 5, 1931.

May 4, 1934.

In Reply address The Bureau of Yards and Docks And Refer To No. NOy-934

Navy Department Bureau of Yards and Docks Washington, D. C.

Change "A".

Subject: Contract NOy-934 (Specification No. 6288) for well, Naval Air Station, Pensacola, Fla.

Gentlemen:

With reference to your contract NOy-934 (Specification No. 6288), dated November 8, 1930, for a well at the Naval Air Station, Pensacola, Fla., you are informed that, owing to the following-mentioned changes, authorized during the performance of the work, namely, that you—

(a) Provide and install pump stand and removable split cover; provide additional 10-inch gate valve and

move chack valve; provide screen or 3/8-inch thickness instead of 1/4-inch; omit 6-inch gravel fill pipes and liquid marine cement mortar; provide spacers for 2-inch wash pipes; and substitute slip ring or wound rotor motor and suitable starting device for squirrel cage motor and control equipment; and

(b) Install an additional 10-inch hub gate valve; raise the elevation of floor or pump house 4 inches; increase the depth of well below top of concrete slab to 139 feet; and install 1 foot 9 inches additional 32-inch casing,

All as directed by the officer in charge.

the contract price, pursuant to the provisions of Article 3 of the contract, is hereby increased for item (a) by the sum of $1,585.78, and increased for item (b) by $523.86, making a total increase of $2,109.64, payable from appropriation No. 7X289, "Naval Air Station, Pensacola, Fla.", subhead No. 3, "Improvement of water system", (Allotments No. 7X289-3-1A and No. 7X289-3-1B), and the time prescribed for the completion of the contract is hereby extended, on account of the work covered by item (a) seventy-eight (78) calendar days, and on account of the work covered by item (b) six (6) calendar days, making a total extension of eighty-four (84) calendar days.

Very truly yours,

A. L. PARSONS,

Chief of Bureau.

Gray Artesian Well Company, Pensacola, Fla.

C—The Comptroller General,

CC—Bureau of Supplies and Accounts.

CC—Public Works Officer, Naval Air Station, Pensacola, Fla.

CC—American Surety Company of New York, New York, N. Y.

CC—Bureau Contract.

16 In reply address The Bureau of Yards and Docks and refer to No. NOy-934.

Navy Department Bureau of Yards and Docks Washington, D. C.

Change "B".

Jul. 10, 1931.

Subject: Contract NOy-934 (Specification No. 6288) for well, Naval Air Station, Pensacola, Fla.

Gentlemen:

With reference to your contract NOy-934 (Specification No. 6288), dated November 8, 1930, for a well at the Naval Air Station, Pensacola, Fla., you are informed that, owing to the following-mentioned change, heretofore authorized, in the work under said contract, namely, that you—

Replace all flanged pump and discharge pump suction connections that are below the top of the screens with screwed sleeve type connections, as directed by the officer in charge,

the time for the completion of the contract is hereby, pursuant to Article 3 of the contract, further extended thirty (30) calendar days, without change in price.

Very truly yours,

A. L. PARSONS,

Chief of Bureau.

Gray Artesian Well Company, Pensacola, Fla.

C—The Comptroller General,

CC—Bureau of Supplies and Accounts.

CC—Public Works Officer, Naval Air Station, Pensacola, Fla.

CC—American Surety Company of New York, New York, N. Y.

CC—Bureau contract.

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17 (2) PROOF OF CLAIM OF AMERICAN SURETY COMPANY.

(Title Omitted:)

State of New York,
County of New York, ss.

1. At the Borough of Manhattan, in the City, County and State of New York, on the 18th day of January, 1932, came Charles W. Goetchius of the Borough of Brooklyn, City of New York, State of New York, and made oath and says: That he is the Treasurer of the American Surety Company of New York, a corporation organized and existing under and by virtue of the laws of the State of New York, and having its Office and principal place of business at No. 100 Broadway, Borough of Manhattan, City, County and State of New York, and that he is duly authorized to make this proof of claim.

2. That the said M. J. Gray, trading as Gray Artesian Well Company, the person against whom a petition for an adjudication in bankruptcy was filed, was at and before the filing of said petition and still is, justly and truly indebted to said American Surety Company of New York in the sum of Nine Hundred Thirty and 19/100 Dollars ($930.19) and for such other sum or sums as said American Surety Company of New York may be compelled to pay by reason of the following facts, which are the consideration of said debt.

3. That on or about November 2nd, 1922, said M. J. Gray, trading as Gray Artesian Well Company, executed and delivered to said American Surety Company of New York his general agreement of indemnity, copy whereof is hereto annexed, marked Exhibit "A" and made a part hereof.

18 4. That relying upon the security of said agreement of indemnity said American Surety Company of New York executed, as surety, bond of said M. J. Gray, trading as Gray Artesian Well Company, dated on or about April 8th, 1929 in the amount of Five Hundred Dollars ($500.00) unto the American National Bank, Pensacola, Florida, as security for the issuance of a duplicate of a certified check dated on or about March 9th, 1929, numbered 3157, payable to the Mayor and Board of Aldermen of the Town of Forest, Mississippi in the amount of Five Hundred Dollars ($500.00) made by said M. J. Gray and drawn on said American National Bank, Pensacola, Florida.

5. That relying upon the security of said agreement of indemnity said American Surety Company of New York executed, as surety, bond of said M. J. Gray, trading as Gray Artesian Well Company, dated on or about November 21st, 1930, in the amount of

Two Thousand Four Hundred Seventy Five and no/-100 Dollars ($2475.00) unto the City of Bainbridge, Georgia, securing performance of contract dated on or about November 21st, 1930 with said City of Bainbridge, Georgia, for drilling a well for said City.

6. That on or about November 15th, 1930 said M. J. Gray, trading as Gray Artesian Well Company, made written application to said American Surety Company of New York for its suretyship on bond of said M. J. Gray, trading as aforesaid, in the amount of Three Thousand Nine Hundred Forty and no/100 Dollars ($3940.00) unto the United States of America, securing performance of contract for drilling a well at the Naval Air Station, Pensacola, Florida; that in conjunction with such application said M. J. Gray, trading as aforesaid, executed and delivered to said American Surety Company of New York his agreement of indemnity, copy whereof is hereto annexed, marked Exhibit "B" and made a part hereof.

19 9. That relying upon the security of said agreement of indemnity said American Surety Company of New York executed, as surety, bond of said M. J. Gray, trading aforesaid, dated on or about November 15th, 1930 in the amount of Three Thousand Nine Hundred Forty and no/100 Dollars ($3,-940.00) unto said United States of America securing performance of said contract for drilling a well at the Naval Air Station, Pensacola, Florida.

10. That competent, written legal evidence of the discharge of said American Surety Company of New York from its liability by reason of its suretyship on the aforesaid bonds has not been furnished to said American Surety Company of New York.

11. That the contract of said M. J. Gray, trading as aforesaid, with the said United States of America

for the drilling of a well at the Naval Air Station, Pensacola, Florida, was completed on or about July , 1931, and that said contract was accepted by said United States of America. That subsequent to the completion of said contract, the following named persons, firms and corporations filed their claims with said American Surety Company of New York as surety for said M. J. Gray, trading as aforesaid, on bond referred to in paragraph nine herein, for payment of the amounts set opposite their names due for labor or materials furnished to said M. J. Gray, trading as aforesaid, on said contract.

Wright Oil Company	$ 73.32
Runyan Cobb Boiler Works	2951.94
Runyan Machine & Boiler Works	49.74
F. D. Brux Company	111.65
Standard Sanitary Manufacturing Co.	110.14
Ferris-Lee Lumber Company	130.40
Woodward Electric Company	205.65
Westinghouse Electric & Mfg. Co.	374.64
Roquemore Gravel Company	60.62
National Cast Iron Pipe Company	435.31
Frederick Gilmore & Company	57.46
Ray Hardware & Truck Company	85.02
Electric Controller & Mfg. Co.	480.60
H. L. Gray	200.00
L. M. Gray	57.17
W. C. Gray	431.55
	$5815.41

20 12. That on or about January 6th, 1932, said American Surety Company of New York, pursuant to the terms of its bonds as aforesaid, paid to Standard Sanitary Manufacturing Company the sum of One Hundred Ten and 14/100 Dollars ($110.14), to the Westinghouse Electric & Manufactur-

ing Company the sum of Three Hundred Seventy Four and 64/100 Dollars ($374.64), and to the National Cast Iron Pipe Company the sum of Four Hundred Thirty five and 31/100 Dollars ($435.31) in satisfaction of their claims against said M. J. Gray, trading as aforesaid, for materials furnished to said M. J. Gray on his contract with said United States of America as aforesaid.

13. That in consequence of such payments by said American Surety Company of New York, there is now due said American Surety Company of New York from said M. J. Gray, trading as aforesaid, the sum of Nine Hundred Thirty and 19/100 Dollars ($930.19).

14. That there is also due said American Surety Company of New York from said M. J. Gray, trading as aforesaid, such further sum or sums as may be necessary to indemnify said American Surety Company of New York and save it harmless from and against every claim, demand, liability, cost, charge, counsel fee, expense, suit, order, judgment and adjudication whatsoever, pursuant to the terms of the agreements of indemnity hereinbefore referred to.

15. That no part of said debt has been paid; that there are no setoffs or counterclaims thereto; that no note has been taken or judgment rendered on said debt; and that said American Surety Company of New York has not, nor has any person by its order or to the knowledge or belief of deponent, for the use of said American Surety Company of New York, had or received any manner of security for said debt whatever, except as herein stated.

21

CHARLES W. GOETCHIUS,
Treasurer of American Surety
Company of New York.

Sworn and subscribed to before me this ..... day of January, 1932.

HORACE P. HOLLISTER,
(Seal) Notary Public, Westchester County Certificate Filed in New York and Kings Counties New York County No. 255, Register's No. 3-H-114, Kings County No. 20, Register's No. 3127, My commission expires March 30, 1933.

(Attached thereto the following):

(EXHIBIT "A".)

Rec'd Nov. 8, 1922 S. B.

American Surety Company of New York.

Capital $5,000,000.

General Contract of Indemnity.

Credit Division Nov. 6, 1922 J. S. Flynn.

(Pictured) Company's Office Building, 100 Broadway N. Y.

Whereas, the undersigned or one or more of them (hereinafter called the Indemnitor) have heretofore required, and may hereafter require suretyship upon certain obligations of suretyship on behalf of the undersigned, or of one or more of them, or of some other person or corporation, and have applied, and one or more of them may hereafter apply to the American

Surety Company of New York (hereinafter called the surety) to execute such instruments, as Surety:

Therefore, the undersigned do hereby, jointly and severally, undertake and agree:

First—That they will pay the Surety at its office, 100 Broadway, in the City of New York, on the day of the date of each such obligation, a premium or charge, for executing such obligation and continuing the same in force for one year, and will thereafter pay a like sum, annually, in advance, until the Surety shall be discharged and released from any and all responsibility upon each such obligation and until the Indemnitor shall serve upon the Surety competent, written, legal evidence of its final discharge from each such obligation and all liability by reason thereof, and the expiration, without appeal or proceedings to review, of the time to appeal from or review any adjudication or determination, directly or indirectly fixing or discharging such liability.

Such premium or charge for each such obligation shall be in accordance with the regular schedule rates published by the Surety.

Second—That the Indemnitor will perform all the conditions of each said bond, and any and all renewals and extensions thereof, and will at all times indemnify and save the Surety harmless from and against every claim, demand, liability, cost, charge, counsel fee (including fees of special counsel whenever by the Surety deemed necessary) expense, suit, order, judgment and adjudication whatsoever, and will place the Surety in funds to meet the same before it shall be required to make payment, and in case the Indemnitor requests the Surety to join in the prosecution or defense of any legal proceeding, the Indemnitor will, on demand of

the Surety, place it in funds sufficient to defray all expenses and all judgments that may be rendered therein. The Indemnitor will not ask or require the Surety to remove or join in any application for the removal of any proceeding from a State Court to a Federal Court in any state where such action would in any way affect the Surety's right to transact business.

Third—That upon the making of any demand, or the giving of any notice, or the institution of any proceeding preliminery to determining or fixing any liability which the Surety may be called upon to discharge by reason of any such suretyship, and any and all renewals and extensions thereof, the Indemnitor will immediately notify the Surety thereof in writing at its said office.

Fourth—That in the event of the Surety deeming it advisable, or of the Indemnitor requesting the Surety, to prosecute or defend or take part in any action, suit, or proceeding, appeal or writ of error, the Indemnitor will, on being advised of the Surety's intent so to do, or on the Indemnitor making such request, place the Surety in possession of funds or securities, approved by it, sufficient to defray any costs, charges or expenses which it may incur in so doing, and to discharge any liability, order, judgment or adjudication which may result therefrom, or from its said suretyship.

Fifth—That the Indemnitor will, on the request of the Surety, procure the Discharge of the Surety from any such suretyship, and all liability by reason thereof.

Sixth—That the Surety shall have every right and remedy which a personal surety without compensation would have, including the right to secure its discharge from its suretyship, and should it make payment thereunder, shall have every right and remedy of the Indemnitor for the recovery of the same.

Seventh—That the voucher or other evidence of any payment made by the Surety by reason of such suretyship, shall have or any renewal or extension thereof, shall be prima facie evidence of such payment and the propriety thereof, and of the liability of the Indemnitor therefor to the Surety.

Eighth—That the Surety also looks to and relies upon the property of the Indemnitor, and the income and earnings thereof, and shall also, at all times have the right to rely upon, look to, and follow and recover out of the property which the Indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the Surety, under this agreement, such suretyship having been by the Surety entered into for the special benefit of the Indemnitor and the special benefit and protection of the Indemnitor's property, its income and earnings.

23 Ninth—That this agreement shall not, nor shall acceptance by the Surety of payment for its suretyship, nor agreement to accept, nor acceptance by it at any time of other surety, nor assent by it to any act of the principal named in any suretyship obligation, or of any person acting on behalf of the principal, or of the Indemnitor, in any way abridge, defer or limit its right to be subrogated to any right or remedy, nor limit nor abridge any right or remedy which the Surety otherwise might or may have, acquire, exercise or enforce, nor create any liability on the part of the Surety which would not exist were this agreement not executed.

Tenth—That the liability of the Indemnitor hereunder shall not in any wise be discharged by any alteration, extension or modification of the suretyship under any such obligation herein, which shall have been re-

quested or assented to by the principal in said obligation and by the Surety; but on the contrary, all the terms of this agreement shall apply to any and all such alterations and modifications.

Eleventh—The Indemnitor hereby further agrees in the event of being unable to complete or carry on any contract covered by any suretyship of the said Surety, executed hereunder, to assign and does hereby assign to the said Surety, all right, title and interest of the Indemnitor in and to all the tools, plant, equipment and materials of every nature and description that the Indemnitor may have upon the work provided for in the contract covered by said suretyship, or in, on or about the site thereof, including as well materials purchased for or chargeable to such contracts, which may be in process of construction, on storage elsewhere, or in transportation to said site; and the Indemnitor further agrees to assign and hereby does assign to the said Surety, all the former's rights in and to all sub-contracts which may be entered into, and the materials embraced therein appertaining to said contract; and the Indemnitor further agrees in the event of any breach or default on his part in any of the provisions of any contract covered by the suretyship of the said Surety executed in pursuance of such contract, that the said Surety, as Surety, shall be subrogated to all the rights that may be due and payable at the and properties of the Indemnitor in such contracts, and that deferred payments and any and all moneys and securities that may be due and payable at the time of such default, or on account of extra work or materials supplied in connection therewith, or that may thereafter become due and payable on account of said contract, shall be credited for any claim that may be made upon the said Surety by reason of its suretyship as aforesaid.

Twelfth—All the terms and conditions of this agreement shall stand for the protection of any co-surety,

any reinsuring company, or any other surety procured by the American Surety Company of New York above named, whether the American Surety Company of New York does or does not execute or retain any portion of any such obligation.

Thirteenth—That the Indemnitor renders the following statement of his financial condition at the close of business on the 2nd day of November, 1922:

24 Financial Statement.

(In the case of a firm use additional separate financial statement for each partner.)

(On Margin: If the required information is not given in response to the foregoing questions, it will be necessary to return this blank for completion. The answers will be treated as strictly confidential.)

Assets.

Real Estate as per Schedule A ..... (Schedule A annexed should be prepared and should describe in detail each piece of real estate owned. State its cost price, its present value, and the nature and amount of encumbrances thereon. The amount should be here entered at its present value without deduction for encumbrances, the amount of such encumbrances being included in the statement of liabilities contra.)	6,750.00
Plant at cost, replacement value $100,000.00 carried at cost, depreciated 10% yearly. Less allowance for depreciation.....	34,000.00
10 drilling outfits—(3 hydraulic rotary outfits, 2 combination (K. D.) for rock,	

other 2 Star Rock drilling outfits, 1 cyclone rock outfit, 1 small rotary outfit, 1 jetting outfit).

(The above in margin stating: "State here briefly the general nature of the plant." "Patents and good will should not be included therein.")

Cash on hand	
Cash in American National Bank of Pensacola	500.00
(Payment from U. S. in mail in route to bank)	2,500.00
Stocks, bonds and similar securities at present market value, as per Schedule B, (Schedule B, annexed should be prepared showing in detail the stocks, bonds and securities owned).	
Notes, and accounts not otherwise included herein secured by lien on real estate.	
Notes and accounts not otherwise included herein secured by collateral.	
Notes and accounts unsecured not otherwise included herein.	
Stock of merchandise at cost. (State generally nature of stock, such as dry goods, groceries, etc.)—Pipe	4,700.00
Due for work completed on unfinished contracts as per Schedule C	5,000.00

(Schedule C annexed should be prepared, describing in brief each contract unfinished, the amount of the contract price, the amount of the work completed, the amount paid on account, and the amount earned but not yet paid.)

Stock unmanufactured and partially manufactured at cost	

(State here the nature thereof.)

Patents	
(State here in a general way the nature of the patents.)	
Good will	
(State here the nature of the good will.)	
Total Assets	53,450.00

Liabilities.

Debts secured by lien on real estate as per Schedule A	None
Debts, including notes, secured by collateral	
Debts due the United States.....	
Debts due any State, county or municipality	
Debts due to laborers or employees.....	
Debts, including notes, unsecured and not yet due	500.00
Debts, including notes, unsecured and past due	
Reserves, if any	
(State here generally the nature of the reserves.)	
*Net Surplus	52,950.00

†Due partners, as follows:

.....

.....

*To be used by an individual only.
†To be used by a co-partnership only.

26 ‡To be used by a corporation only:

‡Undivided profits .....
‡Surplus .....
‡Capital Stock, divided into .... shares of $....., each .....

Total Liabilities 53,450.00

Note:—Items inapplicable may be left blank. In the case of a co-partnership, similar financial statement from each individual partner should be obtained if the amount of credit required exceeds that warranted by the firm's statement.

Schedule A.

House & Lot—314 S. Alcaniz St., Pensacola, Fla., cost $3000 in 1916—Present value at lease	$5,000.00
160 A. in Jackson Co., Fla. (cut-over land)	1,000.00
5 lots in Cottondale, Fla. (just sold one similar lot at $160.00)	750.00
	6,750.00

Schedule B.

.....

Schedule C.

U. S. Naval Air Station—	earned, not paid	$1,250.00
City of Eufaula, Ala.—	earned, not paid	600.00
O. B. Andrews Co.—	earned, not paid	1,000.00
Muscogee Co. Alms House—	earned, not paid	1,000.00
Brookhaven, Miss.		1,150.00
		5,000.00

27 The Indemnitor hereby certifies that each statement hereinbefore contained is true and

that this statement is made for the purpose of inducing the American Surety Company of New York to execute certain bonds or undertakings without demanding collateral security for the full amount thereof.

Signed and sealed ..... Nov. 2, 1922.

M. J. GRAY, doing business as
Gray Artesian Well Co.

Signed, sealed and delivered in the presence of:
(Name indecipherable.)

(Acknowledge signature on next page.)

(Individual Acknowledgment.)

State of Ga.,
County of Fulton, ss:

On this 2nd day of Nov., 1922, before me personally came M. J. Gray, to me known and known to me to be the person described in and who executed the foregoing instrument, and he thereupon acknowledged to me that he executed the same.

E. G. SNOW,
Notary Public, Fulton Co., Ga.

Form C. 20 M 1-21.

American Surety Company of New York.

Capital $5,000,000.

(Pictured) Company's Home Office Building.

Agency at Pensacola, State of Fla.

Name K. Bros. Agcy., Agent or Attorney.
Branch Office at .....
Bond No. 294840-D.
Sub. Ag'y Bond No. 87.
Amount $3,940.00.
Premium $196.90.

Application for Contract of Bid Bond.

Note: These should accompany this application:

1. Financial Statement, Form C413 with schedules.

2. Copy of Contract, or in case of a bid, of advertisement instructions and bid showing date
28 and signature. (Copy contract to follow.)

3. Copy of specifications, and of every contract, franchise or other document referred to in, made part of or governing the contract or bid. Plans as a rule not necessary.

Place and Date of This Application—Pensacola, Fla., Nov. 15th, 1930.

To American Surety Company of New York:
Application is hereby made for a bond of suretyship, as follows:

1. Name, age, business address and residence. (In the case of a partnership add name and residence of each partner, in the case of a corporation add names and residences of the four principal officers, and state date of organization or incorporation, name principal holders of stocks and bonds, if any.)—M. J. Gray, trading as Gray Artesian Well Company, Pensacola, Florida.

2. Name and address of obligee United States of America. (If an agent, officer or board, give full description as per contract, specifications and bond.)

3. Place and date of bid opening, if any—Washington, D. C., Nov

4. Bid Contract—For Drilling well, Pensacola, Naval Air Station, Pensacola, Fla.

5. Bid Contract—Dated .....

6. Bid Contract—Price $13,133.36.

7. Time for completion 120 days.

8. Penalty for delay—$15.00 per day.

9. Grounds for extension of time—usual conditions.

10. Terms of payment, reserved percentage—Cash.

11. Does contract cover patent indemnity? No.

12. Terms and duration of guarantees of efficiency, maintenance and repairs, if any, in contract of specifications—One Year maintenance.

13. Date of bond—Nov. 15th, 1930.

14. Amount of bond—$3940.00.

15. If a bid bond, will it operate as a contract bond? .....

16. If a bid bond, not to operate as a contract bond, amount of contract bond will be $....., if not specified, then the amount in which surety on contract bond must justify will be $.....

29

17. Limit on time for suit.....

18. Name, title and address of architect or engineer in charge—Govt. Engineer.

Note.—If the required information is not given in response to the foregoing questions, it will be necessary to return this blank for completion. The answers will be treated as strictly confidential.

19. If you bid for contract, give other bids including highest and lowest:

Name—Address.	Bid.
Layne Central Co., Memphis, Tenn.....	$13,192.00
English Constr. Co., Washington, D. C...	$13,500.00
Sprague & Henwood, Inc., Pittsburg, Pa..	$15,290.00

20. State nature of business, and if carried on in other States, territories or countries, specify the same .....

21. State number of years experience as contractor 25 years.

22. List of contracts now being performed with location, amount and percentage completed.

State Nature of Work and Owner—.....
Location—.....
Contract Price—.....
% Completed—.....
Expected completion date—.....

23. If you bid for the contract did you give a proposal bond? If so, state when, and to whom, and with what result—No.

24. Have you ever applied to any other source for a bond for this contract? If so, state when, and to whom, and with what result—No.

25. Have you furnished bonds before? Give names of your sureties. What bonds are now outstanding? Yes—American Surety Company.

26. Are you engaged or interested in any other line of business? If so, state its nature, location, firm names, names of partners, etc.—No.

27. Have you, or if a firm or corporation, has said firm or corporation, or any firm or corporation or individual to which it is a successor, or any member of said firm, ever compromised with its or his creditors, or become bankrupt or in any other way become discharged from its or his debts otherwise than by payment thereof in full? If so, state details thereof, in full, in confidential letter to be annexed .....

28. Do you carry Messenger, or Paymaster Robbery or Hold-up Insurance? If so, give particulars .. ..

29. References. Give names of your bankers, also merchants, supply houses and others who have granted you credit.

Name ..... Occupation ..... Address .....

Should the American Surety Company of New York, hereinafter called the Surety, execute or procure the execution of the suretyship hereinbefore applied for or other suretyship in lieu thereof, the undersigned, hereinafter called the Indemnitor, does, (if there be more than one Indemnitor they jointly and severally), in consideration thereof, hereby undertake and agree:

I. That the statements contained in the foregoing application are true.

II. That the Indemnitor will immediately pay the Surety at its Office, 100 Broadway, New York City $196.99 for two years ..... day of .... in each year, hereafter, until the Indemnitor shall serve upon the surety competent, written, legal evidence of its final discharge from such suretyship, and any and all renewals and extensions thereof; and in the event of said Surety executing or procuring the execution of a contract bond, or of this obligation becoming effective as a contract bond or of an award or order and no contract bond required, the Indemnitor will pay said surety ..... per cent. of the amount of the contract, award or order covered by such suretyship, annually in advance (the minimum annual premium to be that customarily charged by the Surety), until the Indemnitor shall serve upon the surety competent, written, legal evidence of its final discharge from such suretyship, and any and all renewals, and extensions thereof; and that in the event of the work to be done or material to be furnished by the contractor in the said contract being increased the Indemnitor shall pay the surety an additional premium of .... per cent. annually on such increase.

III. That the Indemnitor will perform all the conditions of said bond, and any and all renewals and extensions thereof, and will at all times indemnify and save the Surety harmless from and against every claim, demand, liability, cost, charge, counsel fee (including fees of special counsel whenever by the surety deemed necessary) expense, suit, order, judgment and adjudication whatsoever, and will place the Surety in funds to meet the same before it shall be required to make payment and in case the Indemnitor requests the Surety to join in the prosecution or defense of any legal proceeding, the Indemnitor will, on demand of the Surety, place it in funds sufficient to defray all expenses and all judgments that may be rend-

ered therein. The Indemnitor will not ask or require the Surety to remove or join in any application for the removal of any proceeding from a State Court to a Federal Court in any state where such action would in any way affect the Surety's right to transact business.

IV. That the suretyship is for the special benefit of the Indemnitor, it property, income and earnings now owned or hereafter acquired, to which the Surety looks for its Indemnity, and the indemnitor represents that it is specifically and beneficially interested therein.

V. That the surety shall have every right and remedy which a personal surety without compensation would have, including the right to secure its discharge from its suretyship, and should it make payment hereunder, shall have every right and remedy of the Indemnitor for the recovery of the same.

VI. That this agreement shall cover not only the suretyship above recited, but all alterations, renewals, extensions or modifications thereof which may be requested or assented to by the Principal named in such obligation. That the surety shall be at liberty to pay or compromise any claim or charge of the character enumerated in section III hereof, and the voucher or other evidence of the payment thereof shall be prima facie evidence of the fact and of the indemnitor's liability therefor to the surety.

VII. The Indemnitor hereby further agrees in the event of being unable to complete or carry on the contract covered by said suretyship to assign and does hereby assign to the said Surety, all right, title and interest of the Indemnitor in and to all the tools. plant, equipment and materials of every nature and description that the Indemnitor may have upon the work provided for in the contract covered by said suretyship, or

in, on or about the site thereof, including as well materials purchased for or chargeable to such contract, which may be in process of construction, on storage elsewhere, or in transportation to said site; and the Indemnitor further agrees to assign and hereby does assign to the said Surety, all the former's rights in and to all sub-contracts which may be entered into and the materials embraced therein appertaining to said contract; and the Indemnitor further agrees in the event of any breach or default on his part in any of the provisions of the contract covered by said suretyship that the said Surety, as surety, shall be subrogated to all the rights and properties of the Indemnitor in such contract, and that deferred payments and any and all moneys and securities that may be due and payable at the time of such default, or on account of extra work or materials supplied in connection therewith, or that may thereafter become due and payable on account of said contract, shall be credited for any claim that may be made upon the said Surety by reason of its suretyship as aforesaid.

32 VIII. That the Indemnitor has pledged with said Surety, as collateral security hereto and for all claims of said Surety against the Indemnitor:

and hereby agrees to keep on deposit at all times until complete performance of this agreement, and the expiration, without appeal or proceedings to review, of the time to appeal from or review, any adjudication or determination directly or indirectly fixing or discharging such liability, securities acceptable to the Surety of the value of $....., with authority to the Surety, on non-performance of any part of this agreement or any other contract between the parties hereto, without notice of amount claimed and without demand, in case said collateral is cash, to pay therefrom any sum which the indemnitor may become liable to pay the Surety

by reason of any contract between the parties hereto; in case such security is the obligation of any person, at its election to sell the same at public or private sale or to collect the same, by action or otherwise, and apply the proceeds thereof to the payment of any public or private sale or to collect the sums which may become due under any contract between the parties hereto; and in case such security consists of stocks, bonds, or other similar securities, to sell the whole or any part thereof, or any substitutes therefor, or any additions thereto, without notice at any broker's board, or at public or private sale, and to apply the proceeds thereof to the payment of any sum which may be due under any contract between the parties hereto; and upon any sale at auction or broker's board by virtue of this agreement the Surety may purchase the whole or any part of said property, discharged from any right of redemption, which is expressly released to said Surety.

IX. All the terms and conditions of this agreement shall stand for the protection of any co-surety, any reinsuring company, or any other surety procured by the American Surety Company of New York above named, whether the American Surety Company of New York does or does not execute or retain any portion of any such obligation.

Signed and sealed Pensacola, Fla. Nov. 15th, 1930.
Applicant GRAY ARTESIAN WELL CO.
Sign here By M. J. GRAY, (Seal).

Signed, sealed and delivered in presence of:
J. (name indecipherable).

Acknowledge Signatures on This Page.

State of Florida,
County of Escambia, ss.

On the 15th day of November, 1930, before me personally appeared M. J. Gray, to me known and known

to me to be the person described in and who executed the foregoing instrument, and he thereupon he acknowledged to me that he executed the same.

J. (name undecipherable)

33 (If this application is declined the Company reserves the right to withhold the reason therefor, If deemed necessary, all information relative thereto is regarded as confidential.)

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(3) OBJECTIONS OF RUNYAN-COBB BOILER WORKS TO CLAIM OF AMERICAN SURETY COMPANY.

34 (Title Omitted.)

Come now A. G. Runyan, Randall Bell and Sheppard Cobb, trading as Runyan-Cobb Boiler Works, creditors of the above named Bankrupt who have duly filed their claim in this proceeding and file this as their objection to the allowance of the claim filed herein by American Surety Company, and in support of, and as grounds for said objection, respectfully show unto the Court as follows, to-wit:

1.

That American Surety Company was surety on the bond given by the above named Bankrupt to the United States in connection with a contract for public work performed by the said Bankrupt for the United States under the said contract at the Naval Air Station, Pensacola, Florida. That the conditions of the said bond were those prescribed by the Statute in such cases made and provided and contained among other conditions the condition that the contractor would

promptly make payment to all persons furnishing labor and materials used in the prosecution of the work under the said contract in connection with which the said bond was given.

2.

That the penalty of the said bond was Thirty-Nine Hundred and Forty ($3940.00) Dollars. That the work on the said contract was completed but that there remained outstanding and unpaid and due and owing to people who had furnished labor and materials to the contractor, which labor and materials were used in and about the prosecution of the work under the said contract, debts amounting in the total aggregate to the sum of Fifty Six Hundred Seventy-Seven and 85/100 ($5677.85) Dollars in accounts due and payable, and all of which came within the protection of the penalty and conditions of the said bond executed by the American Surety Company as surety as aforesaid.

3.

That suit was duly brought in the United States District Court for the Northern District of Florida on the said bond and the American Surety Company appeared and paid into Court the sum of Thirty-Nine Hundred Forty ($3940.00) Dollars which was the penalty of the said bond. That after payment, under judgment of the said Court, of the costs and expenses of the said proceeding out of the penalty of the said bond there remained to be distributed pro rata to the claimants holding bills and accounts for labor and materials furnished to the contractor and used in and about the prosecution of the work under the said contract the sum of Thirty-Eight Hundred Thirty-Eight and 60/100 ($3838.60) Dollars. And that under final judgment of the United States District Court for the

Northern District of Florida this sum was distributed to the said labor and material claimants pro rata. But that the said sum was insufficient to pay up the said claims in full.

4.

That the sum of Twenty-Seven Hundred Twenty-Four and 23/100 ($2724.23) Dollars remained unpaid by the United States to the above named Bankrupt as proceeds of the contract between the Bankrupt and the United States. That the said sum was paid into the registry of the Supreme Court of the District of Columbia by the Secretary of the Navy for the United States in the case of the American Surety Company vs. M. J. Gray et als brought in said Court. That in the proceedings in the District of Columbia these objectors intervened claiming a superior right in the fund which constituted the proceeds of the contract, in the performance of which contract the labor and materials of these objectors and of other labor and material
36 claimants were used. That the Trustee in Bankruptcy of M. J. Gray also intervened in said proceeding and the result of the proceeding was that the Supreme Court of the District of Columbia ordered that the said fund, less the costs and expenses deductible therefrom be transmitted to this Court for distribution under order of this Court and in these Bankruptcy proceedings.

5.

That of the labor and material claimants holding outstanding claims of Fifty-Six Hundred Seventy-Seven and 85/100 ($5677.85) Dollars as aforesaid, all of the said claims having been adjudicated by the United States District Court for the Northern District of Florida, the following have filed their claim in

these Bankruptcy proceedings, viz: these objectors: Runyan Machine and Boiler Works; Standard Sanitary Manufacturing Company; H. L. Gray; W. C. Gray, Ray Hardware and Truck Company; National Cast Iron Pipe Company; Frederick Gilmore and Company; and Electric Controller Manufacturing Company. That the claim of these objectors was adjudicated to be Twenty-Nine Hundred Fifty-One and 94/100 ($2,951.94) Dollars for labor and materials furnished the contractor on the contract aforesaid, without interest; and that of Runyan Machine and Boiler Works was adjudicated to be in the sum of Forty-Nine and 74/100 ($49.74) Dollars; that of T. D. Brux Company to be in the sum of One Hundred Eleven and 65/100 ($111.65) Dollars; that of Standard Sanitary Manufacturing Company to be in the sum of One Hundred Ten and 14/100 ($110.14) Dollars; that of H. L. Gray to be in the sum of Two Hundred ($200.00) Dollars; that of W. C. Gray to be in the sum of Three Hundred Fifty-Two ($352.00) Dollars; that of Ray Hardware & Truck Company to be in the sum of Eighty-Five and 02/100 ($85.02) Dollars; that of National Cast Iron Pipe Company to be in the sum of Four Hundred Thirty-Five and 51/100 ($435.51) Dollars; that of Frederick Gilmore and Company to be in the sum of Fifty-Seven and 47/100 ($57.47) Dollars; and that of Electric Controller Manufacturing Company to be in the sum of Four Hundred Eight and 60/100 ($480.60) Dollars. That the payments on account of these claims, as distributed by judgment of the United States District Court for the Northern District of Florida were as follows, viz: to these objectors Eighteen Hundred Thirty-Five and 55/100 ($1835.55) Dollars; to Runyan Machine and Boiler Works Thirty and 87/100 ($30.87) Dollars; to T. D. Brux Company Sixty-Nine and 33/100 ($69.33) Dollars; to Standard Sanitary Manufacturing Company Sixty-Eight and 39/100 ($68.39) Dollars; to H. L. Gray, One Hundred Twenty-four

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and 19/100 ($124.19) Dollars; to W. C. Gray Two Hundred Eighteen and 57/100 ($218.57) Dollars; to Ray Hardware and Truck Company Fifty-Two and 79/100 ($52.79) Dollars; to National Cast Iron & Pipe Company Two Hundred Seventy and 43/100 ($270.43) Dollars; to Frederick Gilmore and Company Thirty-Five and 69/100 ($35.69) Dollars; and to Electric Controller Manufacturing Company Two Hundred Ninety-Eight and 43/100 ($298.43) Dollars. That the difference between the adjudicated amounts of these claimants and the amounts received as the proceeds of the distribution of the penalty of the bond, plus interest from August 1st, 1931 are still due and payable to the claimants aforesaid for account of labor and materials furnished to the contractor, M. J. Gray and used in the prosecution of the work performed under said contract which labor and materials created the fund of Twenty Seven Hundred Twenty-Four and 23/100 (2724.23) Dollars.

6.

That the American Surety Company has not paid any of the sums mentioned in paragraph twelve of its claim except that it caused to be paid The Standard Sanitary Manufacturing Company the sum of One Hundred Ten and 14/100 ($110.14) Dollars. That the Standard Sanitary Manufacturing Company has filed its claim in these proceedings for the said One Hundred Ten and 14/100 ($110.14) Dollars. That the said claim in truth and in fact, so these objectors are informed and believe and therefore aver, belong to American Surety Company but the said claims was assigned to Knowles Brothers Agency as assignee and this assignee appeared in the proceedings in the United States District Court for the Northern District of Florida in which the proceeds of the penalty of the bond aforesaid were distributed

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and Knowles Brothers Agency collected on account of the said claim the sum of Sixty-eight and 39/100 ($68.39) Dollars. That to the extent of the Standard Sanitary Manufacturing Company's claim less the payment made to Knowles Brothers Agency as assignee, plus interest from the date of payment by American Surety Company to Standard Sanitary Manufacturing Company, the American Surety Company is entitled to participate in the proceeds of the Twenty-Seven Hundred Twenty-Four and 23/100 ($2724.23) Dollars fund. But Standard Sanitary Manufacturing Company's claim is in and American Surety Company's claim is a duplicate of the claim of the original creditor. That none of the other claims mentioned in said paragraph twelve has been paid by American Surety Company.

7.

That the labor and material claimants aforesaid have filed claims in these proceedings and are entitled to have balances due them paid in full with interest out of the fund of Twenty-Seven Hundred Twenty-Four and 23/100 ($2724.23) Dollars, less the necessary costs and expenses to be allowed by this Court out of the said fund. And that the American Surety Company has no right to the fund, or to any part thereof, until and unless the said material and labor claimants who under the law have a special equity in the said fund, shall have paid in full for the material and labor claims they have against the above named Bankrupt arising and accruing by reason of labor and materials furnished the said Bankrupt and used by him in and about the prosecution of the work under the contract aforesaid.

Wherefore, these objectors object to the said claim of American Surety Company and assert their right to a superior equity in the said fund, together with the

pro rata right of the other labor and material claimants who have filed their claims in this Bankruptcy proceeding.

WM. FISHER,
Attorney for Objectors.

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(4) SUPPLEMENTAL PROOF OF CLAIM OF AMERICAN SURETY COMPANY.

39 (Title Omitted.)

State of New York,
County of New York.

1.

At the Borough of Manhattan in the City, County and State of New York, on the 6th day of September, 1933, came Chas. W. Goetchius of the Borough of Brooklyn, City of New York and State of New York, and made oath and says that he is the Treasurer of the American Surety Company of New York, a corporation organized and existing under and by virtue of the laws of the State of New York, and having its office and principal place of business at No. 100 Broadway, Borough of Manhattan, City, County and State of New York, and that he is duly authorized to make this proof.

2.

That he has heretofore on the 18th day of January 1932, made proof of the claim of said American Surety Company of New York against the estate in Bankruptcy of M. J. Gray, trading as Gray Artesian Well Company, and filed said proof in this Court on January

20, 1932, before the Referee in Bankruptcy herein, and now makes this supplemental proof of the claim then made and filed by him.

3.

That said American Surety Company of New York has not been required to make any payment by reason of the execution by it as surety of the bond of said M. J. Gray, trading as aforesaid, for $500.00 to the American National Bank of Pensacola, Florida, mentioned and described in paragraph 4 of said original proof of claim, nor on account of the execution by it as surety of the bond of said M. G. Gray, trading as aforesaid, for $2475.00 to the City of Bainbridge, Georgia, mentioned and described in paragraph 5 of said original proof of claim.

4.

That paragraph 9 of said original proof of claim shows the execution by said American Surety Company of New York as surety, of the bond of said M. J. Gray, trading as aforesaid, in the amount of $3940.00 to United States of America, securing the performance of a contract of said M. J. Gray, trading as aforesaid, for drilling well at Naval Air Station, Pensacola, Florida; and other paragraphs of said proof of claim show the presentation to said American Surety Company of New York as surety upon said bond, of claims by various persons of amounts asserted to be due them for labor and materials furnished to said M. J. Gray, trading as aforesaid in the performance of said contract.

5.

That after the filing of said original proof of claim a proceeding was instituted in the District Court of the United States for the Northern District of Florida,

in accordance with the statutes of the United States, by the United States of America for the use and benefit of A. G. Runayn, Randall Bell and Sheppard Cobb, co-partners trading under the firm name of Runyan-Cobb Boiler Works, as plaintiffs, against M. J. Gray, trading as Gray Artesian Well Company, and American Surety Company of New York, as defendants, seeking the recovery of $2951.94 from the defendant M. J. Gray, trading as aforesaid, and from the said defendant American Surety Company of New York, as surety upon the bond for $3940.00 mentioned in paragraph 4 hereof on account of labor and materials furnished to said M. J. Gray, trading as aforesaid, for use in the prosecution of the work under his said contract with the United States of America; and thereafter various other persons intervened in said proceedings and sought to recover against the defendants therein amounts likewise claimed to be due them for labor and materials furnished to said M. J. Gray,
41 trading as aforesaid for use in the prosecution of the work provided for in said contract; and said American Surety Company of New York filed its answer in said proceeding admitting the execution of said bond and thereafter in pursuance of an order entered by the said Court in the said proceeding on the 8th day of September, 1932, said American Surety Company of New York deposited with the Clerk of the said Court in pursuance of the statutes of the United States the sum of $3940.00, being the amount of the penalty of the bond sued upon therein, and thereafter by another order entered by said Court in said proceeding on the 21st day of September, 1932, said American Surety Company of New York was discharged from further liability and obligation upon said bond; and thereafter by another order entered in said cause on the 15th day of November, 1932, the said fund so deposited with the Clerk of said Court was disbursed and distributed to the plaintiffs and the several interveners

therein on account of their said claims for materials and supplies furnished to said M. J. Gray, trading as aforesaid; that the aggregate amount of the said claims for labor and materials as determined by the Court was largely in excess of the penalty of said bond and by said order the amount so deposited as the penalty of said bond was distributed pro rata among said claimants to be applied upon the amounts of their claims as adjudicated, leaving balances due thereon; that by the terms of said order after allowing the amount of $39.40 for costs of the Clerk of said Court and an aggregate of $62.00 for costs of plaintiffs and interveners therein the remainder, to-wit: the sum of $3838.60 was apportioned and distributed and was thereafter by the clerk of said Court paid to said claimants in
42 the amounts set opposite their respective names as follows:

Runayn-Cobb Boiler Works,	$1835.56
Runyan Machine & Boiler Works,	30.87
T. D. Brux Company,	69.33
Ferriss Lee Lumber Company,	81.00
C. S. Woodward Electric Company,	127.70
Knowles Bros. Agency,	68.39
Wright Oil Company,	45.53
H. L. Gray,	124.19
L. M. Gray,	61.47
W. C. Gray,	218.57
Ray Hardware & Truck Co.,	52.79
Roquemore Gravel Company,	37.64
Electric Controller Mfg. Co.,	298.43
National Cast Iron Pipe Company,	270.43
Walter A. Taylor,	248.38
Frederick Gilmore & Company,	35.69
Westinghouse Electric & Mfg. Co.,	232.63

6.

That said American Surety Company of New York has been required to expend and has expended in con-

nection with its said bond for $3940.00 mentioned in paragraph 4 hereof certain amounts for investigation of claims against it arising and asserted on account of said bond and for the defense of the suit brought against it upon said bond in the United States District Court for the Northern District of Florida and mentioned in paragraph 5 hereof, and in the litigation instituted by it in the Supreme Court of the District of Columbia, mentioned in paragraph 7 hereof, to establish the priority of its claim against the amount hereinafter mentioned remaining due by the United States of America to said M. J. Gray, trading as aforesaid, which expenses aggregate the sum of $521.81 and for which said American Surety Company of New York has not been reimbursed.

7.

That upon the acceptance by the United States of America of the work of said M. J. Gray,
43 trading as aforesaid, under his said contract with the United States for the drilling of said well at Naval Air Station, Pensacola, Florida, there remained due to him from the United States $2724.07 of the amount to be paid him under said contract, but large amount were due by him for labor and materials furnished in said work; that the said amount remaining due under said contract was pdi into the Supreme Court of the District of Columbia in a proceeding brought therein by American Surety Company of New York, against W. H. Owens, Trustee in Bankruptcy of M. J. Gray Artesian Well Company, Charles F. Adams. Secretary of the Navy and others, to enforce a lien and priority upon the amount so remaining due by the United States, but the Supreme Court of the District of Columbia declimed to adjudicate the priorities of the several claims to said fund made in said proceed-

ing and ordered the said fund paid to the Trustee in Bankruptcy of said M. J. Gray, trading as aforesaid, and the said fund was thereafter paid to said Trustee in Bankruptcy for distribution in the administration of the estate of said bankrupt as this Court should determine.

8.

That by reason of the facts alleged in said original proof of claim and in this supplemental proof, said American Surety Company of New York was, and is, entitled to a lien upon the said amount remaining due by the United States upon its said contract with M. J. Gray, trading as aforesaid, which has now been paid as aforesaid to the Trustee in Bankrupty of said M. J. Gray, and is now held by said Trustee, to secure to it repayment of the amount of the penalty of its said bond in the amount of $3940.00 paid as aforesaid to the furnishers of materials and supplies to the said M. J. Gray, trading as aforesaid, and the said sum of $521.81 paid out by it as expenses in connection with said bond and its liability thereon, in preference to and with priority over the claims of other creditors of said bankrupt, including creditors with claims for materials and supplies furnished in performance of the said contract with the United States of America.

CHAS. W. GOETCHIUS,
Treasurer of American Surety Co., of New York.

Sworn and Subscribed to before me this 6th day of September, A. D. 1933.

(Seal)

J. P. BREARTON,
Notary Public.

(5) ADDITIONAL OBJECTIONS OF RUNYAN-COBB BOILER WORKS TO SUPPLEMENTAL PROOF OF CLAIM OF AMERICAN SURETY COMPANY.

44 (Title Omitted.)

Now comes Runyan-Cobb Boiler Works and adopts as its objections to the supplemental proof of claim filed by American Surety Company September 15, 1933, the allegations of the objections to the original claim filed by American Surety Company.

WM. FISHER,
Attorney for Runyan-Cobb Boiler Works.

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(6) OBJECTIONS OF WESTINGHOUSE ELECTRIC MANUFACTURING COMPANY AND OTHERS TO SUPPLEMENTAL PROOF OF CLAIM OF AMERICAN SURETY COMPANY.

(Title Omitted.)

Now come Westinghouse Electric Manufacturing Company, a corporation, National Cast Iron Pipe Company, a corporation, Walter A. Taylor, and Frederick Gilmore & Company, whose claims and interventions have been duly filed in this cause, and file this their objections to the allowance of the claim of the American Surety Company, a corporation, herein, and for grounds of said objections show unto the Court as follows, to-wit:

45 1.

That these creditors furnished to the bankrupt labor and/or materials for use in, and which were necessary

to be used in, and which were actually used in the performance by the bankrupt of its contract with the United States of America mentioned in the petition of said American Surety Company; that there has been paid to them the amounts respectively set opposite their names in paragraph 5 of the amendment to the claim of said American Surety Company, leaving a balance due them respectively on their said claims as set forth in their claims and petitions filed herein, reference to which being hereby made; that the sums heretofore received by them on their said claims represented their pro rata part of the $3940.00 paid into the Registry of the District Court of the United States for the Northern District of Florida by said American Surety Company as set forth in their claims filed herein; that said sum was wholly insufficient to pay and discharge all of the claims of these creditors, as well as the claims of other creditors who furnished labor, materials and supplies which were used by the said bankrupt in the performance of his contract with the United States of America as aforesaid; that the sum of $2724.07 mentioned in said claim of American Surety Company represents the balance due from the United States of America to said bankrupt under the contract mentioned in the claim of said company, and represents the proceeds of said contract.

2.

That there is now due and owing to your several petitioners the amounts set forth in their respective claims and petitions filed herein, with interest, as aforesaid, and that said balance due them is for work and materials and/or labor furnished to and used by said bankrupt in the performance of his contract with the United States of America mentioned in the claims of said American Surety Company, and to guarantee the performance of which contract and the payment of all

claims for labor and materials the said American Surety Company executed the bond mentioned in its claim; that no part of said balance due these creditors has been paid by said American Surety Company, or any person whomsoever.

46

3.

That the said sum of $2724.07, or so much thereof as has come to the hands of the Trustee in Bankruptcy in this cause, less such costs and expenses as the Court shall order to be paid therefrom, is and represents a trust fund, charged with a special equity or equitable lien in favor of these creditors and in favor of other creditors of said bankrupt who likewise furnished labor, materials and supplies which were necessary to enable said bankrupt to perform his contract aforesaid, and which were used by said bankrupt in the performance of said contract; and these creditors show unto the Court that their equity to have said fund, or so much thereof as may be necessary to satisfy and discharge their said claims, paid over to them for such purpose, is superior to any right or equity in or to said fund of the said American Surety Company, a corporation, which said company did not furnish any labor, materials or supplies to enable the said bankrupt to perform his contract aforesaid, but which guaranteed the performance of said contract by said bankrupt and guaranteed by its bond the payment of all claims for labor and materials used in the performance of said contract, up to the amount of the penalty of its bond aforesaid; and these creditors allege that in equity and in justice they were and are entitled to look to the full amount of the penalty of said bond plus the amount of the balance due on said contract and which has come to the hands of the Trustee aforesaid, or so much thereof as may be necessary, to satisfy and discharge their said claim before the said American Surety Com-

pany should be entitled to enforce any claims against said fund now in the hands of the Trustee in Bankruptcy as alleged in their said petition, merely by reason of their having executed as surety the bond of said bankrupt, and merely by reason of the other facts alleged in their said petition.

47 Wherefore, these creditors object to the said claim of said American Surety Company, a corporation, insofar as it seeks to share on a priority of, and/or on an equality with their rights in said fund now in the custody of this Court, and allege that they have or are entitled to assert a superior right and equity in said fund, together with the pro rata right of the other labor and material claims entitled to share in said fund, superior to any right or claim thereto or therein of said American Surety Company, a corporation.

WATSON & PASCO & BROWN,
Attorneys for Objectors.

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(7) ORDER OF THE REFEREE DATED NOVEMBER 21, 1933, SUSTAINING THE OBJECTIONS TO THE CLAIM OF PRIORITY OF AMERICAN SURETY COMPANY.

(Title Omitted.)

This cause coming on to be heard upon the objections of Westinghouse Electric Mfg. Company, National Cast Iron Pipe Company, Walter A. Taylor, Frederick Gilmore & Company, and Runayn-Cobb Boiler Works, creditors of this estate in bankru tcy to the allowance of the petition of the American Surety Company, for priority of payment of its claim and the same

having been duly considered by the Court after argument by counsel for the respective parties, and the Court being advised of its opinion in the premises, it is:

Ordered, Adjudged and Decreed that the said objections be and the same are hereby sustained and that the said petition of the American Surety Company for priority be and the same is hereby denied.

48 It Is Further Ordered that W. H. Owens, trustee, be and he is hereby authorized and directed to distribute all money now in his hands ratably among all creditors of this estate which have heretofore allowed priority and, when said priority claimants are paid in full, to pay the balance of said money, if any there be, to the American Surety Company on account of its aforesaid claim.

Done And Ordered at Pensacola in said District this 21st day of November, A. D. 1933.

ALSTON FISHER,
Referee in Bankruptcy.

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(8) PETITION OF AMERICAN SURETY COMPANY FOR REVIEW BY THE DISTRICT JUDGE OF THE REFEREE'S ORDER DATED NOVEMBER 21, 1933.

(Title Omitted.)

To the Honorable Alston Fisher, Referee in Bankrupt:

The petition of American Surety Company, a corporation respectfully represents that it is a creditor of the above named bankrupt and that its claim against the estate of said bankrupt and its amendment of said claim have heretofore been filed in this proceeding

and that heretofore an order has been entered in this cause by Your Honor as such Referee dated the 21st day of November, A. D. 1933, a copy of which is hereby annexed; that such order was erroneous in that:

1. It sustained the objections of Westinghouse Electric Mfg. Company; National Case Iron Pipe Company; Walter A. Taylor; Frederick Gilmore & Company and Runyan-Cobb Boiler Works, creditors of said estate in bankruptcy, to the allowance of petitioner's claim for priority of payment as set forth in its amended claim.

49 2. It denied your petitioner priority of payment of its claim from the fund in the hands of the Trustee arising as retained payment out of the construction contract between the bankrupt and the United States of America, as alleged in petitioner's amended claim.

3. It directed the Trustee herein to distribute said fund ratably among all creditors heretofore allowed priority in disregard of the right of petitioner to priority of the payment out of and a lien upon the fund aforesaid.

Wherefore, Your petitioner prays that the said order of November 21st, A. D. 1933, may be reviewed by the Judge of this Court as provided by the Statutes of the United States and by General Order No. XXVII in Bankruptcy, and that Your Honor as such Referee shall certify the same to the Judge as in said General Order provided.

This 14th day of December, A. D. 1933.

CARTER & YONGE,
Attorneys for Petitioner.

(9) ORDER OF DISTRICT JUDGE DATED MARCH 8TH, 1934, SUSTAINING THE REFEREE'S ORDER DATED NOV. 21, 1933.

50 In the District Court of the United States for the Northern District of Florida.

In the Matter of:

Melton J. Gray, trading as Gray Artesian Well Company, Bankrupt.

Claim of American Surety Company of New York, a Corporation.

This cause coming on to be heard upon the petition of American Surety Company of New York, a corporation, for a review by this Court of the order made by Hon. Alston Fisher, a Referee in Bankruptcy of this Court, on the 21st day of November, A. D. 1933, sustaining the objections of Westinghouse Electric Manufacturing Company, National Cast Iron Pipe Company, Walter A. Taylor, Frederick Gillmore & Company and Runyan-Cobb Boiler Works, creditors of said estate in bankruptcy, to priority of payment of the claim of said American Surety Company of New York, from certain funds of the said estate in bankruptcy; and upon the certificate of the said Referee in Bankruptcy dated the 14th day of December, A. D. 1933 filed herein in pursuance of said petition; and upon the contract of said Gray Artesian Well Company with the United States of America and the bond of said Gray Artesian Well Company as principal and said American Surety Company of New York as surety, given to the United States of America in connection with said contract, and the application of said Gray Artesian Well Company to said American Surety Company for

said bond and its contract of indemnity with said American Surety Company, all of which are filed with and a part of said certificate; and also upon the original and supplemental proof of claim of said American Surety Company of New York and the objections thereto of Runyan-Cobb Boiler Works, Westinghouse Electrict Manufacturing Company, National Cast Iron Pipe Company, Walter A. Taylor and Frederick Gillmore Company, filed with and a part
51 of the said certificate of said Referee, and this Court having considered the same and having heard the arguments of counsel for said American Surety Company and said creditors objecting to its claim and being advised of its opinion that the said order of the said Referee should be sustained;

It Is Therefore Considered, Ordered And Adjudged that the said order of the said Referee dated November 21, A. D. 1933 be, and the same is hereby approved and sustained.

Done And Ordered at Chambers at Pensacola in the said Northern District of Florida, on this the 8th day of March, A. D. 1934.

WM. B. SHEPPARD,
Judge.

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(10) PETITION OF AMERICAN SURETY COMPANY FOR ALLOWANCE OF APPEAL TO THE CIRCUIT COURT OF APPEALS.

52 (Title Omitted.)

Now comes American Surety Company of New York, a corporation, in the above stated cause and feeling

itself aggrieved by the order and final judgment entered therein against it dated March 8th, 1934, sustaining the order of Hon. Alston Fisher, a Referee in Bankruptcy of said Court, dated November 21st, 1933, which order sustained the objections of certain creditors of said estate in Bankruptcy namely: Westinghouse Electric Manufacturing Company, a corporation, National Cast Iron Pipe Company, a corporation, Walter A. Taylor, Frederick Gillmore & Company, a corporation, and A. G. Runyan, Randall Bell and Sheppard Cobb, trading as Runayn-Cobb Boiler Works to the claim of said American Surety Company of New York to priority of payment from certain funds of said estate in Bankruptcy, does hereby enter its appeal from said final judgment dated March 8th, 1934, to the United States Circuit Court of Appeals for the Fifth Circuit, for the reasons set forth in the assignment of errors hereunder written and presented herewith; and in connection with said appeal respondent herewith presents security by bond for supersedeas in the sum of $250.00 conditioned that it shall prosecute its appeal
53 to effect and if it fails to make its plea good, shall answer all damages and costs; and it prays that said appeal be allowed; that said security by bond be approved as to the surety thereon and the amount, form, execution and sufficiency thereof; that said appeal do operate as a supersedeas and that a transcript of the record of the proceedings in said cause be duly authenticated and sent to said Appellate Court in accordance with the law and the rules in said cases made and provided.

CARTER & YONGE,
Attorneys for American Surety Company of New York.

(11) ASSIGNMENT OF ERRORS ON APPEAL OF AMERICAN SURETY COMPANY.

(Title Omitted.)

Now comes said American Surety Company of New York and in connection with the foregoing appeal entered from the final judgment against it and in favor of said objecting creditors, dated March 8th, 1934, in the cause mentioned in said appeal, files this its assignment of errors and says that in the record, proceeding and judgment aforesaid manifest error hath happened and intervened to its prejudice and it assigns the following errors on its said appeal, to-wit:

54 The District Court in and by its order and final judgment dated March 8th, 1934, erred in:

1. Approving and sustaining the order of Alston Fisher, Referee in Bankruptcy, dated November 21, 1933.

2. Approving and sustaining the order of Alston Fisher Referee in Bankruptcy dated November 21, 1933, which sustained the objections of certain objecting creditors; namely, Westinghouse Electric Manufacturing Company, a corporation, National Cast Iron Pipe Company, a corporation, Walter A. Taylor, Frederick Gillmore & Company, a corporation, and A. G. Runayn, Randall Bell and Sheppard Cobb, trading as Runyan-Cobb Boiler Works, to the claim of said American Surety Company of New York to priority of payment from certain funds of the estate of Melton J. Gray. trading as Gray Artesian Well Company in bankruptcy.

3. Denying to said American Surety Company of New York, priority of payment of its claim against

said estate in bankruptcy from the fund in the hands of the Trustee in Bankruptcy of said estate arising as retained payment out of the construction contract between said bankrupt and the United States of America.

4. Directing the said Trustee in Bankruptcy to distribute the fund in his hands arising as retained payment out of the construction contract between said bankrupt and the United States of America ratably among all of the creditors of said estate theretofore allowed priority, in disregard of the right of said American Surety Company of New York to priority of payment out of and a lien upon the said fund.

5. Holding that American Surety Company of New York, as surety upon the said bankrupt's performance bond given to secure its construction contract with the United States of America, is not entitled to a lien upon, or priority of payment out of, the fund remaining in the hands of the United States (and now held by the trustee as a part of the bankrupt's estate) upon completion of the bankrupt's construction contract and constituting the retained payments under the balance due to the bankrupt upon his construction contract.

6. Holding that the American Surety Company of New York, as surety upon the said bankrupt's performance bond given to secure its construction contract with the United States of America, is not entitled under the bond and its contract of indemnity with its principal to priority of payment of its claim for reimbursement of the amounts it was required to pay under the bond to creditors who furnished materials used by the bankrupt in the performance of his contract, out of the retained payments under the contract remaining in the hands of the United States of America upon the

completion of the contract and now held by the trustee in bankruptcy of the contractor as a part of the bankrupt's estate.

CARTER & YONGE,
Attorneys for American Surety Company of New York.

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(12) ORDER OF THE DISTRICT JUDGE DATED APRIL 7TH, 1934, ALLOWING APPEAL.

(Title Omitted.)

On the 7th day of April, 1934, said American Surety Company of New York named in the foregoing appeal and assignment of errors, presented and filed
56 the same together with security by bond for supersedeas in the sum of $250.00 with this Court, and the Court having duly considered the same and being advised of its opinion;

It Is Therefore Considered And Ordered that the said appeal as prayed for and entered be and the same is hereby allowed, returnable May 5th, 1934, for review by the United States Circuit Court of Appeals for the Fifth Circuit of the final judgment dated March 8th, 1934, and the proceedings in said cause as mentioned and set out in said appeal and assignment of errors; that the security by bond for supersedeas presented therewith and described therein be and the said is hereby approved as to the surety thereon and as to the amount, form, execution and sufficiency thereof; that said appeal do and shall operate as a supersedeas and that citation on said appeal do issue to Westinghouse Electric Manufacturing Company, a corporation,

National Cast Iron Pipe Company, a corporation, Walter A. Taylor, Frederick Gillmore & Company, corporation, A. G. Runyan, Randall Bell and Sheppard Cobb, trading as Runyan-Cobb Boiler Works, W. H. Owens, as Trustee of the said estate of Melton J. Gray, Trading as Gray Artesian Well Company in bankruptcy, Runyan Machine & Boiler Works, a corporation, Knowles Bros. Agency, a corporation, H. L. Gray, W. C. Gray, Ray Hardware & Truck Company, a corporation, Electric Controller and Manufacturing Company, a corporation, T. D. Brux Company, a corporation, returnable May 5th, 1934.

Done And Ordered at Pensacola in the Northern District of Florida, on this 7th day of April, 1934.

WM. B. SHEPPARD,
District Judge.

Receipt is hereby acknowledged of copies of the above appeal, assignment of errors, order made thereon and supersedeas bond referred to therein this 4th day of April, 1934.

WATSON & PASCO & BROWN,
Attorneys for Westinghouse Electric Manufacturing Company, National Cast Iron Pipe Company, Walter A. Taylor and Frederick Gillmore & Company.

57 FISHER & FISHER,
Attorneys for A. G. Runayn, Randall Bell and Sheppard Cobb, trading as Runayn-Cobb Boiler Works, T. D. Trux Company, a corporation, and Runyan Machine and Boiler Works.

J. McHENRY JONES,
Attorney for W. H. Owens, Trustee in Bankruptcy of the estate of Melton J. Gray, trading in Gray Artesian Well Company.
HOLSBERRY & HOLSBERRY,
Attorneys for H. L. Gray, W. C. Gray, Ray Hardware and Truck Company and Electric Controller and Manufacturing Company,
KNOWLES BROS. AGENCY,
By KNOWLES HYER,
Vice-Pres. & Gen. Mgr.

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(13) BOND OF AMERICAN SURETY COMPANY ON APPEAL.

Know All Men By These Presents: That we, American Surety Company of New York, a corporation, and Hartford Accident and Indemnity Company, a corporation duly authorized to do a surety business in the State of Florida and to become surety upon bonds authorized or required to be given in proceedings in the Federal Courts having jurisdiction in the Northern District of Florida, are held and firmly bound unto Westinghouse Electric Manufacturing Company, a corporation, National Cast Iron Pipe Company, a corporation, Walter A. Taylor, Frederick Gillmore & Co., a corporation, A. G. Runyan, Randall Bell and Sheppard Cobb, trading as Runyan-Cobb Boiler Works, W. H. Owens, as Trustee of the estate of Melton J. Gray, Trading as Gray Artesian Sell Company in bankruptcy, Runyan Machine Boiler

Works a corporation, Knowles Bros. Agency, a corporation, H. L. Gray, W. C. Gray, Ray Hardware & Truck Company, a corporation, Electric Controller and Manufacturing Company, a corporation and T. D. Brux Company, a corporation, jointly and severally in the sum of Two hundred and Fifty ($250.00) Dollars for the payment whereof well and truly to be made, we bind ourselves and our successors jointly and severally firmly by these presents.

58 Signed And Sealed this 2nd day of April, 1934.

The condition of the foregoing obligation is such that, whereas lately in the District Court of the United States for the Northern District of Florida, in the matter of Melton J. Gray, trading as Gray Artesian Well Company bankrupt, in bankruptcy, upon the objections of Westinghouse Electric Manufacturing Company, a corporation, National Cast Iron Pipe Company, a corporation, Walter A. Taylor, Frederick Gillmore & Company, a corporation, and A. G. Runyan, Randall Bell and Sheppard Cobb, trading as Runyan-Cobb Boiler Works to the claim of said American Surety Company of New York, a corporation, a final judgment was rendered dated the 8th day of March, 1934 against said American Surety Company of New York, sustaining the objections of said objecting creditors to the claim of said American Surety Company of New York, to priority of payment from certain funds of said estate in bankruptcy; and said American Surety Company of New York has taken and entered its appeal from said judgment to the United States Circuit Court of Appeals for the Fifth Circuit to review said judgment and the proceedings in said cause, which appeal has been allowed;

Now Therefore, if the said American Surety Company of New York, a corporation, shall prosecute its said appeal to effect and, if it fails to make good its plea, shall answer all damages and costs, then this obligation shall be null and void, otherwise to be and remain in full force and effect.

AMERICAN SURETY COMPANY OF NEW YORK,
By CHAS. W. GOETCHIUS,
(Corporate Seal) Vice President.

Attest:
(Name indecipherable),
Assistant Secretary.

HARTFORD ACCIDENT & INDEMNITY COMPANY OF HARTFORD, CONN.,
By (Name indecipherable),
Attorney-n-Fact.

The foregoing bond is approved both as to surety thereon and as to its amount, sufficiency and form as security for supersedeas this 7th day of April, 1934.

WM. B. SHEPPARD,
U. S. District Judge.

59 State, City and County of New York, ss:

On this 2nd day of April, 1934, before me personally appeared Chas. W. Goetchius, Vice-President of the American Surety Company of New York, to me known, who being by me duly sworn, did depose and say that he resides in the City of New York; that he is the Vice-President of the American Surety Company of New York, the Corporation described and which executed the above instrument; that he knows the corporate seal of said Corporation; that the seal affixed to said instrument is such corporate

seal; that it was so affixed by order of the Board of Trustees of said corporation, and that he signed his name thereto by like order; and that the liabilities of said Corporation do not exceed its assets as ascertained in the manner provided by law. And the said Chas. W. Goetchius further said that he is acquainted with Vincent W. Nash and knows him to be the assistant secretary of said Corporation, that the signature of said Vincent W. Nash subscribed to the said instrument, is in the genuine handwriting of the said Vincent W. Nash and was thereto subscribed by the like order of the said Board of Trustees, and in the presence of him the said Chas. W. Goetchius, Vice-President.

J. P. BREARTON,
Notary Public, New York
(Seal) County No. 227, etc.

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(14) CITATION ON APPEAL.

United States of America: ss.

The President of the United States to Westinghouse Electric Manufacturing Company, a corporation, National Cast Iron Pipe Company, a corporation, Walter A. Taylor, Frederick Gilmore & Company, a corporation, A. G. Runyan, Randall Bell and Sheppard Cobb, trading as Runyan-Cobb Boiler Works, W. H. Owens, as Trustee of the said estate of Melton J. Gray, trading as Gray Artesian Well Company, in bankruptcy, Runyan Machine and Boiler Works, a corporation, Knowles Bros.
60 Agency, a corporation, H. L. Gray, W. C. Gray, Ray Hardware & Truck Company, a corporation, Electric Controller and Manufacturing Company, a corporation, and T. D. Brux Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals for the Fifth Circuit to be held at the City of New Orleans in the State of Louisiana on the 5th day of May, 1934, pursuant to an order allowing an appeal duly entered of record in the Clerk's office of the District Court of the United States for the Northern District of Florida wherein American Surety Company of New York, a corporation, is appellant and Westinghouse Electric Manufacturing Company, a corporation, National Cast Iron Pipe Company, a corporation, Walter A. Taylor, Frederick Gillmore & Company, a corporation, A. G. Runyan, Randall Bell and Sheppard Cobb, trading as Runyan-Cobb Boiler Works, W. H. Owens, as Trustee of the estate of Melton J. Gray, trading as Gray Artesian Well Company, in bankruptcy, Runyan Machine and Boiler Works, a corporation, Knowles Bros. Agency, a corporation, H. L. Gray, W. C. Gray, Ray Hardware and Truck Company, a corporation, Electric Controller and Manufacturing Company, a corporation and T. D. Brux Company, a corporation, are appellees, to show cause, if any there be, why the final judgment rendered against said appellant and in favor of appellees dated March 8th, 1934, as mentioned in said appeal and order allowing same should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. B. Sheppard, Judge of the United States District Court for the Northern District of Florida, at Pensacola, in said District, this 7th day of April, 1934.

WM. B. SHEPPARD,
U. S. District Judge.

Due, timely and sufficient service of the foregoing citation on appeal is hereby acknowledged this 7th day of April, 1934.

WATSON & PASCO & BROWN,

61 Attorneys for Westinghouse Electric Manufacturing Co., Nat'l Cast Iron Pipe Company, Watler A. Taylor and Frederick Gillmore and Company.

FISHER & FISHER,

Per WM. FISHER,

Attorneys for A. G. Runyan, Randall Bell and Sheppard Cobb, trading as Runyan-Cobb Boiler Works, T. D. Brux Company, a corporation, and Runyan Machine and Boiler Works.

J. McHENRY JONES,

Attorney for W. H. Owens, Trustee in Bankruptcy of the Estate of Melton J. Gray, trading as Gray Artesian Well Company.

HOLSBERRY & HOLSBERRY,

Attorneys for H. L. Gray, W. C. Gray, Ray Hardware and Truck Company, and Electric Controller and Manufacturing Company.

KNOWLES BROS. AGENCY,

By KNOWLES HYER.

62 United States District Court, Northern District of Florida.

I, F. W. MARSH, Clerk of the United States District Court, in and for the Northern District of Florida, do hereby certify that the foregoing pages numbered one to 61 contain a true and correct transcript of the proceedings in the matter of Melton J. Gray, trading as Gray Artesian Well Company, Bankrupt: Objections to claim of American Surety Company of New York; as set forth in the Directions to Clerk for preparation of said transcript, and taken from the original papers on file in this office.

Witness my hand and the seal of this Court at Pensacola, Florida, this 19th day of April, A. D. 1934.

F. W. MARSH, Clerk,
By MARION HOWE,
Chief Deputy Clerk.

(Seal)

[fol. 80] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

No. 7382

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

versus

WESTINGHOUSE ELECTRIC MANUFACTURING COMPANY, a Corporation, et al.

ARGUMENT AND SUBMISSION

Extract from the Minutes of January 28th, 1935

On this day this cause was called, and, after argument by J. E. D. Yonge, Esq., for appellant, and Wm. Fisher, Esq., for appellees, was submitted to the Court.

[fol. 81] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 7382

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, Appellant,

versus

WESTINGHOUSE ELECTRIC MANUFACTURING COMPANY, a Corporation, et al., Appellees

Appeal from the District Court of the United States for the Northern District of Florida

(February 13, 1935)

Before Bryan, Sibley and Walker, Circuit Judges

OPINION OF THE COURT AND DISSENTING OPINION OF SIBLEY, CIRCUIT JUDGE—Filed February 13, 1935

WALKER, Circuit Judge:

The appellant was the surety on a bond in the sum of $3,940.00, given in pursuance of statute (40 U. S. C. A.

§270) to secure performance by one Gray of his contract with the United States for drilling a well at the Pensacola Naval Air Station, which contract included the provision that the contractor would promptly make payment to all persons supplying the contractor with labor and materials [fol. 82] in the prosecution of the work provided for in the contract. Gray completed the work contracted for, but remained indebted, in the sum of $5,677.85, to appellees, who had supplied materials used in the work contracted for; and Gray was adjudged bankrupt. Appellant appeared in a suit instituted in the court below on the bond, and paid into court the amount of the penalty of the bond, $3,940.00, which amount was distributed ratably to the appellees, leaving substantial balances still owing by the contractor to the appellees. After the completion of the work called for by the contract, the United States owed the contractor $2,774.23, being the amount of ten per cent of estimates, retained pursuant to a provision of the contract. That sum was paid to the trustee of the estate of the bankrupt contractor. In the bankruptcy proceeding the appellees claimed that they were entitled to a lien on that fund and to priority of payment therefrom of the balance remaining due to them; and the appellant asserted the claim that it had a lien on or a prior right to that sum for the repayment to it of the amount of the penalty of the bond which had been paid. The proof of claim filed by the appellant made an exhibit thereto a copy of a contract of indemnity executed to the appellant by the contractor prior to the time of appellant becoming surety on the bond, which indemnity contract contained the provision: "and the Indemnitor further agrees in the event of any breach or default on his part in any of the provisions of the contract covered by said suretyship that the said Surety, as Surety, shall be subrogated to all the rights and properties of the Indemnitor in such contract, and that deferred payments and any and all moneys and securities that may be due and payable at the time of such default, or on account of extra work or materials supplied in connection therewith, or that may thereafter become due and payable on account of said contract, shall be credited for [fol. 83] any claim that may be made upon the said Surety by reason of its suretyship as aforesaid." The appellees filed objections to the claim filed by the appellant. The

referee sustained those objections, and denied the claim of priority asserted by the appellant. The court approved that action of the referee.

The condition of the above mentioned bond, after a recital of the making of the above mentioned contract, follows: "Now Therefore, If the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Government, with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, and if said contract is for the construction or repair of a public building or a public work within the meaning of the act of August 13, 1894, as amended by act of February 25, 1905, shall promptly make payment of all persons supplying the principal with labor and materials in the prosecution of the work provided for in said contract, and any such authorized extension or modification thereof, then, this obligation to be void; otherwise to remain in full force and virtue." The bond, like the statute requiring it, has two purposes: 1. To secure to the Government faithful performance of the contractor's obligations to the Government; 2, to protect third persons who furnish labor and material to the contractor. The furnishers of labor or material for the work contracted are, like the Government, beneficiaries of the bond. Equitable Surety Co. v. McMillan, 234 U. S. 448, 454. In the absence [fol. 84] of a statute on the subject furnishers of labor or material to a contractor have the legal status of general creditors. Before the enactment of any Federal statute on the subject, it was not unusual for the Government to recognize the existence of a moral duty to protect furnishers of labor or material for a public work against dishonest or reckless contractors by requiring the insertion in a contract for such work of a provision requiring payment by the contractor of amounts owing by him to furnishers of labor or material for the work contracted for, or entitling the Government to withhold payments to the con-

tractor if he failed to pay promptly those who furnished labor and materials. Greenville Sav. Bank v. Lawrence, 76 Fed. 545. It appears from decisions referred to below that the Government's observance of that duty in practical and effective ways was the precursor of judicial recognition of an enforceable equitable right of unpaid furnishers of labor or materials for that work in or to a part of the contract price thereof remaining in the possession of the Government after the completion of that work by the contractor. Nothing contained in the statute in pursuance of which the bond on which appellant was surety was executed is inconsistent with the Government's recognition of the continued existence of a duty to protect furnishers of labor or material, with the result of making such furnishers beneficiaries of the funds withheld by the Government. The conclusion that, in the circumstances disclosed in the instant case, the appellees had claims on the fund in question superior to the claim asserted by the appellant is supported by the decision in the case of Henningsen v. United States Fidelity & Guaranty Co., 208 U. S. 404. That case was a contest between the surety on the bond of a contractor for a public building and a bank which was the assignee of the contractor; the surety, after the completion of the building by the contractor and his failure to pay [fol. 85] amounts owing by him to furnishers of labor and materials for the building, having paid those amounts; and the contractor, pending performance of the contract, having assigned to the bank all payments which were then due, or might thereafter become due, on account of the contract, to secure the payment of a loan made by the bank to the contractor. The subject of the contest was a sum of money in possession of a United States official which was due under the contract after the completion of the building by the contractor. The bond given by the contractor, like the bond on which the appellant was surety, provided for the contractor making prompt payment to furnishers of labor or materials for the work contracted for. The court's opinion contained the statement, made in support of the expressed conclusion that the surety's equity was superior to that of the bank: "It paid the laborers and materialmen, and thus released the contractor from his obligations to them, and to the same extent released the Government from all equitable obligations to see

that the laborers and supplymen were paid." Following that statement and a further discussion of the question presented, the court stated the conclusion that the surety by subrogation had a superior claim to the fund in question, without expressly stating to whose rights the surety was subrogated. As the contractor's obligation to the Government had been complied with before the surety paid the debts owing to furnishers of labor and materials, there was no right of the Government subject to be acquired by the surety by subrogation. The rights subject to be acquired by the surety by subrogation being those possessed by the furnishers of labor and materials, it is a reasonable, if not necessary, inference that the successful contestant's recognized superior right was acquired by subrogation to the rights of the furnishers of labor and material for the building contracted for. With reference to the last cited case the following was said in the opinion rendered in the case of Belknap Hardware & Mfg. Co. v. Ohio River C. Co., [fol. 86] 271 Fed. 144, 149: "When Henningsen's surety paid up, the United States, the secured creditor, had been satisfied, and had no further claim on the fund, unless it bore the duty to devote the fund to the labor and material claimants; hence the latter proposition must be considered as affirmed. Obviously, the retained fund is devoted to the payment for such labor and material as may be necessary to finish the work after the contractor defaults." As to the fund in court in the instant case, the appellant was not subrogated to any right of the Government, as the Government had no claim on the fund after the contractor had completed the work contracted for. The appellant was not subrogated to the rights of the appellees, as the debts owing to the latter by the contractor remained unsatisfied. The conclusion that the appellees, in the circumstances disclosed, have an equitable claim on the fund in question, superior to the claim asserted by the appellant, is supported by the decisions in the two cases last cited, and by other Federal decisions, including the following: In re: McGarry & Son, 240 Fed. 400; Cox v. New England Equitable Ins. Co., 247 Fed. 955; Alfred Richards Brick Co. v. Rothwell, 18 App. Cas. D. C. 516; Exchange State Bank v. Federal Surety Co., 28 Fed. (2), 485, 488.

The assignment and the indemnity agreement under which the appellant claims did not have the effect of sub-

ordinating the rights of the appellees to those of the appellant. The contractor being under an implied obligation to indemnify or reimburse the appellant, an express agreement to do so added nothing to appellant's rights. Hardaway v. National Surety Co., 211 U. S. 552; Springfield National Bank v. American Surety Co., 7 Fed. (2), 44.

The appellees being creditors of the appellant's assignor, the insolvent contractor, the appellant's claim is subordinate to those of the appellees for the additional reason that [fol. 87] the appellant, the surety of the insolvent debtor, is not, prior to the creditors being fully paid and satisfied, subrogated to rights or remedies the enforcement of which would operate to the prejudice or injury of the creditors. Jenkins v. National Surety Co., 277 U. S. 258; United States v. National Surety Co., 254 U. S. 73; State of Mississippi v. First Nat. Bank of Greenwood, 66 Fed. (2), 9; Peoples v. Peoples Bros., 254 Fed. 480; Glades County, Fla. v. Detroit Fidelity & Surety Co., 57 Fed. (2), 449.

The ruling in question was not erroneous. The order or decree appealed from is affirmed.

SIBLEY, Circuit Judge, dissenting:

The amended claim of American Surety Company asserted a prior lien on the fund paid to the contractor's trustee in bankruptcy by the United States. The objections of the materialmen asserted a prior lien in themselves and a right to be paid to the entire exclusion of the Surety Company, the fund being insufficient to pay all. The referee sustained the objections and ordered the materialmen to be paid first. This is the judgment which is to be affirmed. The Surety Company is at least a general creditor. The materialmen assert no priority under any provision of the Bankruptcy Act. They must and do assert a lien existing prior to bankruptcy. I see no basis for one [fol. 88] without judicial legislation. The majority opinion concedes, and it is undoubtedly true, that without the aid of a statute furnishers of labor and material to a contractor are merely his general creditors. While the Roman law was otherwise, the English law gave them no special right or lien either at law or in equity against the property improved or against the sum to be paid to the contractor. South Fork Canal Co. vs. Gordon, 6 Wall. at p. 571; Van-Stone vs. Stillwell, 142 U. S. 128; Prince vs. Neal-Millard

Co., 124 Ga. 884; 18 R. C. L., Mechanics' Liens, §1; 40 C. J., Mechanics' liens, §3. The insolvency of their debtor does not create any equity in them. Withrow Lumber Co. vs. Glasgow Inv. Co., 101 Fed. 863. Many American States have passed statutes giving a lien on varying conditions either against the property improved or against the money to be paid for the improvement. These statutes do not usually include public contracts, because the public property ought not to be sold on execution and because public officials ought not be harassed by garnishments or their equivalent. The protection most commonly afforded to suppliers of labor and material for public work is to require the contractor to give a bond conditioned for their payment. This was done as respects public work performed for the United States by the Act of August 13th, 1894, 40 U. S. C. A. § 270. Before that Act materialmen had no special rights in the money to be paid to the contractor, unless by some provision of the contract. Lawrence vs. United States, 71 Fed. 228. I am unable to see that the statute gives them any right except to share with the United States in the penalty of the bond. At first laborers and materialmen shared on a footing of equality with the United States, but a later amendment has postponed them. Nowhere and at no time has the statute given them any right to control the money coming to the contractor or any lien upon it. By the consent of the United States and the contractor expressed in their contract, special rights may arise as to the disposition of the money. An agreement [fol. 89] that some of it shall be withheld by the United States was dealt with in the leading case of Prairie State Bank vs. United States, 164 U. S. 227, before the statute was ever passed. At p. 233 it was said: "A stipulation in a building contract for the retention until the completion of the work of a certain portion of the consideration is as much for the indemnity of him who may be the guarantor of the performance of the work, as for him for whom the work is to be performed; it raises an equity in the surety to the fund created." The surety's equity was held to date back to the execution of the contract which required the retention, and thus to be prior to the contesting bank's later assignment. The surety was held to have an original right to be secured by the fund so set apart, and also a secondary equity to be subrogated to the right of the United States

to retain it. In Henningsen vs. United States Fidelity & Guaranty Co., 208 U. S. 404, which is mainly relied on in the majority opinion and in Belknap Hardware & Mfg. Co. vs. Ohio River Co., 271 Fed. 144, it is not stated whether or not the contract required the retention by the United States of the unpaid money, but one would suppose there was such a requirement because it was declared that Prairie State Bank vs. United States, supra, was in point, and that case went wholly upon the contractual segregation of the fund. The court in the Henningsen case speaks of subrogation but does not say to whose right the surety became subrogated, and the argument is sought to be made that since the contract was completed the United States no longer had any right when the surety paid out its money, so that the subrogation spoken of must have been to some right of the laborers and materialmen, who therefore must have been held to have a lien. But the headnote in the official report states: "In such a case the surety is subrogated to the rights of the contractor, but the bank is not." If that correctly states the ruling, the rights of the materialmen were not at all considered, and the ruling was [fol. 90] that the surety, bound since the date of his contract, was subrogated to the right of the contractor to collect the balance due on the completed contract, and the bank's assignment of date later than the contract was inferior, and the bank being a voluntary lender had no possible right of subrogation. Such a subrogation would work whether the unpaid balance was retained under the contract as a security for the surety or not, for the contractor's right to payment does not depend on such retention; and it would also seem that if it was so retained the surety would not need any subrogation because he had a direct and original right to be protected by the fund so set apart, it being a trust. Walker vs. Brown, 165 U. S. 654; Glades County vs. Detroit Fidelity and Surety Co., 57 Fed. (2d) at p. 452. The only way to arrive at a lien for the materialmen that I can see is to assume that money retained by requirement of the contract is for the security of them also. This has not yet been authoritatively held, and because of the number of laborers and materialmen might prove embarrassing to Government in settling up contracts. The contract ought clearly to indicate such a purpose. The present contract does not. It contains no requirement that

suppliers of labor and material be paid. The only reference in the contract to paying them is a provision that additional security on the bond protecting them can be required if the surety furnished should become unacceptable. The contract, like the statute, contemplates only the bond to secure them. The bond, of course, is conditioned to be void if the contractor fully performs the contract and in addition pays promptly all persons supplying labor and materials. If the contractor fails to pay any of them the surety must pay up to the penalty of his bond, but that is all. This it has done, and the bond and all its obligations are satisfied. The unpaid balances the contractor still owes, but the surety does not; and the contractor owes them because of the several contracts of purchase, not because of his bond or his contract with the United States. [fol. 91] This contract does provide for the retention of ten percent. of the payments to be made to the contractor, but gives discretion to stop retentions after fifty percent. of the work is satisfactorily done. Ten percent. of the contract price is $1524.00. Since the work was satisfactorily done only half of that, $762.00, was required to be retained. A discretionary retention is admitted to give rise to no rights in the materialmen in Alfred Richards Brick Co. vs. Rothwell, 18 App. Cas. D. C. 516. It follows that the trust fund is only $762.00, or at most $1524.00. This court has held that money not required to be retained is free money in the hands of the contractor upon which there is no trust or lien even in favor of the surety. Kane, Trustee, vs. First National Bank, 56 Fed. (2d) 534. I find nothing in this contract to show that the reserved percentages were for the benefit of anybody but the United States and the surety, as held in Prairie State Bank vs. United States, but if they were under trust also for the materialmen the trust covers at most $1524.00 and not the whole $2775.25 paid over by the United States.

In my opinion, under this contract and under the federal statute the materialmen have no special rights or lien either on the percentages contracted to be retained or on the free balance, but must be held to have credited the general responsibility of the contractor and the bond taken for their protection. The surety has a direct right, and also a right by subrogation, in respect of the retained percentages. I do not consider that the indemnity agree-

ment with the contractor contains an intelligible assignment of anything. The surety may be disentitled to have any relief by equitable subrogation until the materialmen are paid in full under principles asserted in Jenkins vs. National Surety Co., 277 U. S. 258, and LeFlore County vs. First National Bank, 66 Fed. (2d) 9. But that does not prevent an assertion of its direct right to the security of [fol. 92] the retained percentages, nor hinder its sharing with the materialmen, all as common creditors, in the bankrupt's general estate. I do not think the judgment totally excluding the surety is correct.

[fol. 93] No. 7382

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

versus

WESTINGHOUSE ELECTRIC MANUFACTURING COMPANY, a Corporation, et al.

Extract from the Minutes of February 13th, 1935

JUDGMENT

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the order or decree of the said District Court appealed from in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant, American Surety Company of New York, a corporation, and the surety on the appeal bond herein, Hartford Accident and Indemnity Company, of Hartford, Connecticut, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

SIBLEY, Circuit Judge, dissenting.

[fol. 94] UNITED STATES' CIRCUIT COURT OF APPEALS
FOR THE FIFTH DISTRICT

No. 7382

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, Appellant,

versus

WESTINGHOUSE ELECTRIC MANUFACTURING COMPANY, a Corporation, et al., Appellees

On consideration of the application of the appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, record and brief have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 6th day of March, 1935.

(Signed) N. P. Bryan, United States Circuit Judge.

[fol. 95] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA:

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 80 to 94 next preceding

this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 7382, wherein American Surety Company of New York, a corporation, is appellant, and Westinghouse Electric Manufacturing Company, a corporation, et al., are appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 79 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 6th day of March, A. D. 1935.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 29, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.